TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 49

FLORIDA LIME AND AVOCADO GROWERS, INC., ET AL., APPELLANTS,

vs.

JACOBSEN, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED APRIL 8, 1959

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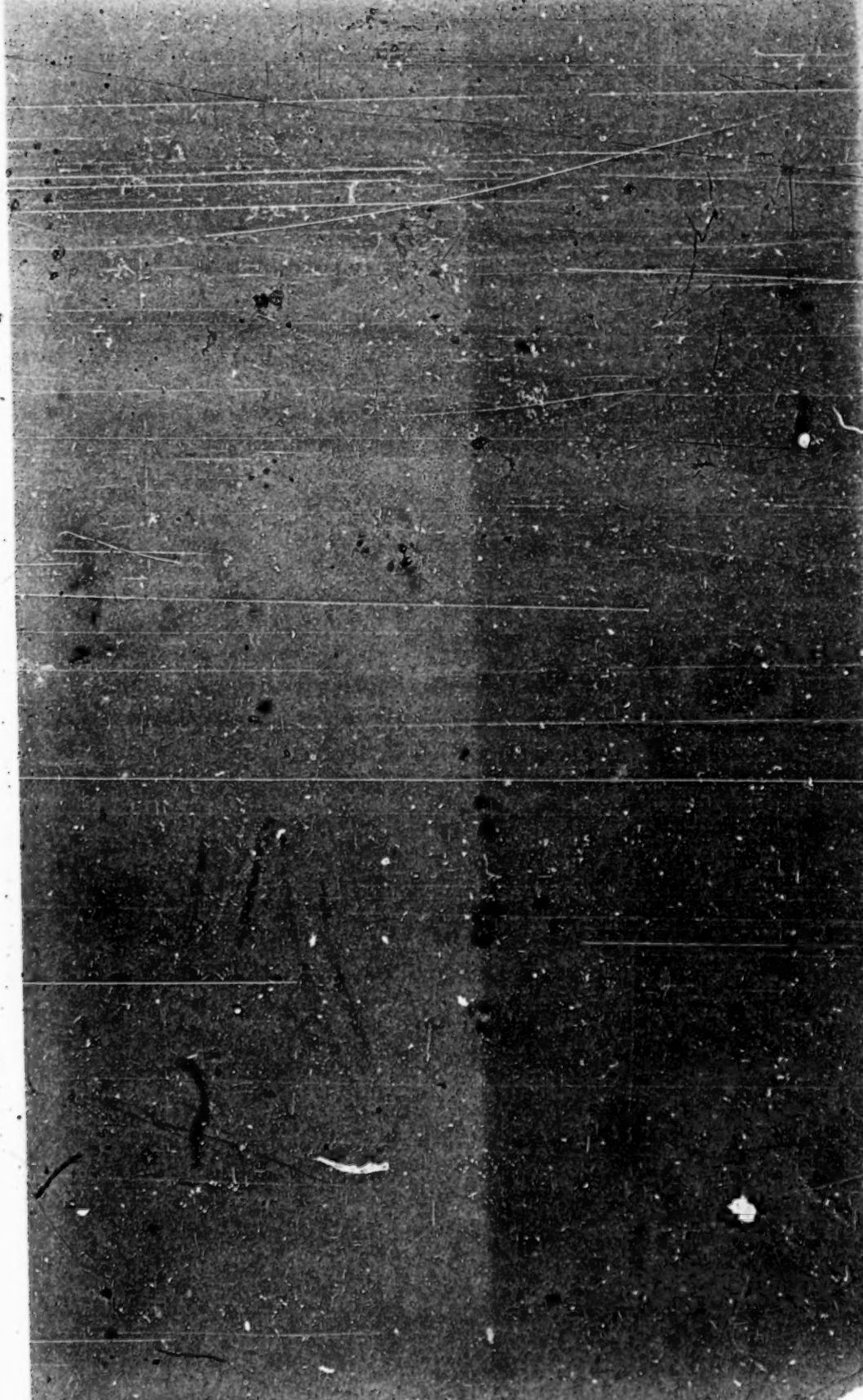

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[fol. A]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civ. 7648

FLORIDA LIME and AVOCADO GROWERS, INC., a Florida Corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida Corporation, Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

CERTIFICATE OF CLERK TO RECORD ON APPEAL—March 20, 1959

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below are true and correct copies of the originals filed in this Court in the above entitled case, and that they constitute the record on appeal herein as designated by the parties.

1. Complaint for injunction to restrain enforcement against plaintiffs of sec 792 of Agricultural Code of California
2. Summons
3. Answer of defendants
4. Letter dated Dec. 11, 1957, from the Hon. Sherrill Halbert, U.S. District Judge to Hon. Albert Lee Stephens, Chief Judge, U. S. Court of Appeals

[fol. B] 5. Request to set action for trial

6. Interrogatories propounded by plaintiffs to the defendant W. C. Jacobsen

7. Answers of defendant W. C. Jacobsen to interrogatories propounded by plaintiffs
8. Notice of motion for order allowing amendment of complaint and answer
9. Interrogatories propounded by defendants to Harold E. Kendall, President of plaintiff South Florida Growers Association, Inc.,
10. Interrogatories propounded by defendants to Fred Piowaty, Secretary of plaintiff Florida Lime and Avocado Growers, Inc.,
11. Notice of motion for dismissal or alternatively for stay of proceedings, as to Florida Lime, etc.,
12. Notice of motion for dismissal or alternatively for stay of proceedings, as to South Florida, etc.,
13. Memorandum & order dated March 20, 1958
14. Amended answer
15. Plaintiff's memorandum in opposition to defendants motion to dismiss case, or to stay proceedings
16. Answers of Harold E. Kendall, President of plaintiff, South Florida Growers Association, Inc., to defendants interrogatories
17. Answers of Fred Piowaty, Secretary of plaintiff, Florida Lime and Avocado Growers, Inc., to defendants' interrogatories
18. Closing points and authorities in support of defendants' motions to dismiss or to stay proceedings
19. Minute order of April 18th, 1958
20. Memorandum and order dated Dec. 17th, 1958
21. Affidavit of service by mail with proposed judgment attached
22. Judgment
23. Clerk's notice of entry of judgment

24. Application for taxation of costs

25. Notice of entry of judgment and of filing of application for taxation of costs

26. Notice of order of dismissal

27. Letter dated Jan. 2, 1959, from John Fourt, Deputy Attorney General to C. C. Evensen, Deputy Clerk, U. S. District Court with attached stipulation to take depositions

[fol. C] 28. Notice of motion by plaintiffs to amend and supplement complaint

29. Letter dated Feb. 4, 1959, from C. C. Evensen, Deputy Clerk, to John Fourt, Deputy Attorney General

30. Special appearance in opposition to plaintiffs' motion to amend and supplement complaint

31. Notice of appeal to the Supreme Court of the United States

32. Defendants'-Appellees' designation of record on appeal

33. Memorandum and order dated Feb. 20, 1959

34. Stipulation for granting of order authorizing original records to be transmitted to Supreme Court

35. Order that original records be forwarded to Supreme Court

36. Stipulation for stay order

37. Order staying judgment

38. Notice of order that original records be forwarded to Supreme Court and of order staying judgment

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 20th day of March, 1959.

C. W. Calbreath, Clerk. By C. C. Evensen, Deputy Clerk.

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

COMPLAINT FOR INJUNCTION TO RESTRAIN ENFORCEMENT AGAINST PLAINTIFFS OF SECTION 792 OF AGRICULTURAL CODE OF CALIFORNIA—Filed November 13, 1957

Florida Lime and Avocado Growers, Inc., a corporation, and South Florida Growers Association, Inc., a corporation, plaintiffs, complain of the defendants W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, and for their cause of action allege as follows:

I.

The plaintiff Florida Lime and Avocado Growers, Inc. was originally organized under the laws of Florida in 1937 as a cooperative association and in 1956 was reorganized [fol. 2] as a corporation for profit, with principal place of business in Princeton, Florida. The plaintiff South Florida Growers Association, Inc., was organized as a corporation under the laws of Florida in 1953 and has its principal place of business in Goulds, Florida. The same business was previously operated as a partnership by Harold E. Kendall and Elizabeth H. Kendall, under the trade name of Florida Growers Association, from 1939 to 1953. Both plaintiffs are engaged in the business of marketing avocados grown in Florida, also in the growing of avocados.

II.

The defendant W. C. Jacobsen is the executive officer of the State of California charged with the duty of conducting the state government's Department of Agriculture; the defendant Goodwin J. Knight is governor of the State of California; the defendant Edmund G. Brown is attorney general of the State of California.

III.

The matter in controversy is the right of the plaintiffs to market Florida avocados in California free from restriction of section 792 of the Agricultural Code of California, and plaintiffs' action is within the jurisdiction of the court by virtue of section 1331 of the Judicial Code (28 USC section 1331) in that the controversy arises under the Constitution of the United States, *viz.*; article I, section 8, clause 3, vesting in Congress the power to regulate commerce with foreign nations and among the states, and the Fourteenth Amendment, section 1, prohibiting any state from making or enforcing any law which denies to any person within its jurisdiction the equal protection of the laws. As to each of the plaintiffs, the matter in controversy exceeds the value of $3,000, exclusive of interest and costs.

IV.

The action is within the jurisdiction of the court, also, [fol. 3] under section 1337 of the Judicial Code (28 USC section 1337) in that the controversy arises under an Act of Congress regulating commerce, namely, the Marketing Agreement Act of 1937, as amended (7 USC section 601 et. seq.).

V.

Said Marketing Agreement Act of 1937 was enacted to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce, by means of marketing agreements between the Secretary of Agriculture of the United States and the producers and handlers of such commodities and the orders and regulations made by the Secretary to carry out such agreements and to effectuate the purposes of the Act, including orders and regulations to establish and maintain minimum standards of quality and maturity and such grading and inspection requirements for the enumerated agricultural commodities as will effectuate the orderly marketing thereof. (Declaration of policy—7 USC section 602, as amended August 1, 1947.)

VI.

Pursuant to the provisions of the Marketing Agreement Act of 1937 and in accordance with the procedure prescribed, a marketing agreement with respect to the avocados grown in South Florida was made between the Secretary of Agriculture of the United States and the producers and handlers of avocados in the designated counties of Florida, effective upon publication in the Federal Register on June 11, 1954 of the Secretary's marketing order No. 69 (19 FR 3430; 7 CFR part 969, pp. 119-131 and Suppl. pp. 14-18; exhibit A hereto attached.)

VII.

Said marketing order No. 69 was made by the Secretary of Agriculture upon findings, among other, that 80% to 90% of Florida avocados are sold in markets outside the state; [fol. 4] that all handling of avocados grown in the designated production area is in the current of interstate and foreign commerce, or directly affects such commerce; that the growers and handlers of Florida avocados have been accustomed to sell the entire production in fresh channel markets, including fruit which is immature and otherwise of poor quality, and this has tended to reduce the demand and the prices for Florida avocados; that the situation can be remedied by imposition of official standards of quality and maturity, under a marketing agreement and order, as a condition precedent to the marketing of Florida avocados. (Findings and decision of Secretary on proposed marketing agreement—April 24, 1954, 19 FR 2418, and May 14, 1954, 19 FR 2784; also order No. 69, section 969.0(5).)

VIII.

Said marketing order No. 69 has remained continuously in force since June 11, 1954. It provides that the Secretary of Agriculture shall issue regulations to carry out the marketing agreement and to effectuate the declared policy of the Marketing Agreement Act, including prohibition of the handling of any size or sizes of any variety or varieties of avocados grown in the production area, or the handling of avocados which do not meet such quality and maturity standards as the Secretary may prescribe. (Sec. 969.51.)

IX.

Said order further provides for the establishment of an Avocado Administrative Committee to serve as the agency of the Secretary of Agriculture in the administration of the program to be carried out under said order. The committee consists of nine members, five growers and four handlers of avocados in the designated production area, nominated and appointed in the manner specified in said order. The powers and duties of the committee include the investigation of growing and maturity conditions of avocados in the [fol. 5] production area; research relating to the determination of maturity and grade standards for avocados; making recommendations to the Secretary of regulations for the handling of avocados grown in the designated area; and generally, aiding in the administration and enforcement of the marketing agreement and order.

X.

Since June 11, 1954 the Secretary of Agriculture has issued numerous regulations prescribing quality and maturity standards for the avocados handled under said marketing order and prohibiting the handling and marketing of avocados which do not meet the prescribed quality and maturity standards. The quality and maturity regulations for the 1957-1958 South Florida avocado crop adopted under said marketing order No. 69 became effective upon publication in the Federal Register as follows: May 23, 1957—22 FR 3652; June 17, 1957—22FR 4251; July 22, 1957—22FR 5679; August 26, 1957—22FR 6746; September 9, 1957—22FR 7173; September 16, 1957—22 FR 7557; October 12, 1957—22 FR 8117. Said regulations set forth the earliest permitted shipping dates for each of the varieties of avocados grown in South Florida: an "A" date, for each variety, when fruit of specified minimum weight or diameter may be shipped; a later "B" date, when fruit of somewhat lesser weight or smaller diameter may be shipped; a still later "C" date, with minimum weight or diameter of the fruit then permitted to be shipped; a "D" date, when avocados of the named variety may be shipped regardless of attained weight or diameter. A summary of said 1957-1958

shipping dates for 45 named varieties of avocados grown in South Florida, also for un-named varieties, prepared by the Avocado Administrative Committee, is hereto attached and marked exhibit B.

[fol. 6] XI.

The Secretary of Agriculture has also issued regulations establishing grade standards for the Florida avocados permitted to be shipped in interstate commerce under said federal marketing order No. 69, *viz.*: regulation issued May 21, 1955 (20 FR 3557) and amended regulation issued April 13, 1956 (21 FR 2409, exhibit C hereto attached), referring for authorization to section 608c of the Agricultural Adjustment Act of 1933, reenacted as part of the Federal Marketing Agreement Act of 1937. Four grades are specified, No. 1 grade, No. 2 grade, a combination grade (not less than 60% of No. 1 grade avocados and balance No. 2 grade, in each container), No. 3 grade. In each of said grades, among other qualities, the avocados are required to be mature but not overripe, and all avocados failing to meet one of said grade standards are condemned as culls. By supplementary regulation published May 24, 1957 (22 FR 3652), no Florida avocados under No. 2 grade may be shipped in interstate commerce during the crop season from June 3, 1957 to April 30, 1958.

XII.

All avocados handled under said marketing order No. 69 are inspected by the joint inspection service of the State of Florida and the federal government and no load of avocados may lawfully depart from the state without presentation of a certificate of such inspection, showing requisite quality and maturity under the said marketing order.

[fol. 7] XIII.

At all times since the Florida 1954-55 crop season for avocados, plaintiffs have been duly registered handlers of Florida avocados under said marketing order No. 69. The current certificate of the plaintiff Florida Lime and Avocado Growers, Inc. as such registered handler of avocados

was issued by the Avocado Administrative Committee on April 9, 1957. The like certificate of the plaintiff South Florida Growers Association, Inc. was issued on the same date. Both certificates are for the period from April 1, 1957 to March 31, 1958.

XIV.

In each of the crop years since 1954-1955 the plaintiff Florida Lime and Avocado Growers, Inc. has picked, packed and distributed approximately 60,000 bushels of avocados, of average value (f.o.b. Florida) of about $275,000. In each of said crop years the plaintiff South Florida Growers Association, Inc. has handled approximately 35% to 40% of the avocados grown and marketed in Florida, viz.: 1954-55—166,818 bushels; 1955-56—206,308 bushels; 1956-57—144,048 bushels; 1957-58, to October 23, 1957—74,500 bushels, and estimated for the remainder of the 1957-58 season 100,550 bushels. The estimated value of the avocados handled and to be handled by said plaintiff in the 1957-58 season is approximately $800,000. Approximately 95% of the avocados handled by plaintiffs are for out of state shipments, on sales in part for plaintiffs' own account and in part for the account of numerous other growers of avocados in South Florida.

XV.

The commercial production of avocados in the United States is concentrated in California and Florida. California, at the present time, is both the largest producer and the largest consumer of avocados. However, there are four or five months of the year when the supply of Florida [fol. 8] avocados exceeds that of California. In the 1955-1956 crop season, when California marketed approximately 1,187,500 bushels of avocados and Florida 506,282 bushels, the Florida supply exceeded that of California in the months of October, November, December and January, and in the 1956-57 season, when the California supply was approximately 575,000 bushels as against 360,927 bushels for Florida, the Florida shipments exceeded those of California in the months of October, November, December, January

and February. Thus, during the fall and winter months, when the California supply of avocados is at its lowest ebb, and when also there is a peak consumer demand for avocados because of reduced supply of other fresh fruits, melons and vegetables, California is an especially favorable market for Florida avocados. Also, with the great influx into California of people from the eastern states, where they were consumers of Florida avocados, there is substantial demand in California for the larger low calorie and mild flavored Florida avocados in preference to those grown in California.

XVI.

Plaintiffs are now constantly receiving offers to purchase Florida avocados from dealers in California, but cannot avail themselves of such offers without prohibitive risk of loss if the defendants are permitted to continue to enforce section 792 of the Agricultural Code of California, pursuant to which no avocado may be marketed in California if it has less than 8% oil content.

XVII.

Chapter 2 of division V of the Agricultural Code of California prescribes standards for fruits, nuts and vegetables that may lawfully be marketed in the state. With respect to avocados, the prescribed standard is as follows:

[fol. 9] "Sec. 792. Avocados.

(*Freedom from defects: Tolerance.*) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(*Definition.*) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(*Oil content.*) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8% of oil, by weight of the avocado excluding the skin and seed."

XVIII.

Section 782 provides that chapter 2 shall be enforced by the Director of Agriculture, and by the commissioners of each county of the state, their deputies and inspectors, under the supervision and control of the director.

XIX.

Section 784 of chapter 2 provides:

"Sec. 784. *Preparation, etc., of non conforming fruits, nuts or vegetables.* It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

[fol. 10]

XX.

As to the containers of avocados, section 788 provides that the standards for containers of fruits, nuts and vegetables prescribed by the Agricultural Code of California are not applicable to containers established as standard by the applicable laws or regulations of the United States. No like provision is contained in the Agricultural Code of California with respect to the quality standards for avocados established by the laws or regulations of the United States.

XXI.

Other sections of said chapter 2 provide for enforcement of the declared standards by condemning non-complying fruits, nuts and vegetables as public nuisances, subject to seizure and destruction in actions to abate such nuisances (section 785), by imposition of penalties in civil actions brought by the Director of the Department of Agriculture (section 785.6), by arrest for transportation of fruits, nuts and vegetables in violation of said chapter (section 786), by making the violation of any of the provisions of said chapter a misdemeanor punishable by fine or imprisonment, or both (section 831).

XXII.

The avocados grown in Florida trace back to plants found in the tropical lowlands of the West Indies and Guatemala; the California avocados come primarily from plants originally found in the colder and less humid regions of Mexico and Guatemala. The Florida avocados are grown in warmer and more humid areas than in California; the Florida fruit is generally much larger than the California fruit, with higher water content and much lower fat or oil content. Some of the highest grade Florida avocados, when fully mature, have oil content of less than 6% and as low as 2%; the principal varieties of California avocados, notably the [fol. 11] Fuerte and Hass, attain oil content of 25% to 30%. While most of the Florida avocados come to full maturity with less than 8% oil content, the commercially dominant California varieties attain 8% oil content at a stage of growth far short of maturity.

XXIII.

Plaintiffs allege that oil content is not a scientifically valid standard of maturity or quality of avocados, particularly when applied to the avocados grown in Florida, and that the maturity of these avocados is assured by correlating the picking dates for each variety with attained weight or size, as is done by the Avocado Administrative Committee and the Secretary of Agriculture under the Florida marketing agreement aforesaid.

XXIV.

All avocados handled by plaintiffs are picked, packed and shipped for sale in compliance with the federal marketing agreement and regulations aforesaid governing the marketing of Florida avocados; and all avocados shipped by plaintiffs in interstate commerce are inspected by the joint federal and state inspection service in Florida and certified as mature and in compliance with the grade standards established by the Secretary of Agriculture pursuant to the authority vested in him by the Federal Marketing Agreement Act of 1937.

XXIV.

As above indicated, most Florida avocados, at the time of picking permitted by the applicable laws and regulations of the United States, and at the time they are certified as mature pursuant to said laws and regulations, have oil content of less than the 8% made prerequisite to sale in California by section 792 of the Agricultural Code of California. As to the Florida avocados which may possibly attain the [fol. 12] 8% oil content, there is risk that one or two of the avocados selected out of entire shipment as part of the sample batch to be tested for oil content may fail to pass the 8% test, thereby subjecting the entire load to condemnation. Because of the great distance between Florida and California and the perishable nature of the fruit, it is impracticable for a Florida shipper to recondition the load by substituting other avocados for those found to be of less than 8% oil content, leaving no practical recourse except to try to sell the rejected avocados in some other western market.

XXV.

Avocados are usually shipped by plaintiffs in truck loads of approximately 2,000 lugs, weighing 34,000 pounds and containing approximately 38,000 avocados. The value of such a load of avocados at prevailing wholesale prices, delivered in California, is $4,000 to $5,000, and if rejected for sale in California the shift to another western market entails risk of loss of a large part of the value of the entire load.

XXVI.

Because of the 8% oil content requirement of section 792 of the Agricultural Code of California, the plaintiffs have been deterred from making shipments of Florida avocados to California. Such shipments have been made with extreme caution to avoid rejection for alleged insufficient oil content and have represented only a small fraction of the avocados handled by plaintiffs. Notwithstanding such caution, shipments of Florida avocados made by plaintiffs to purchasers or consignees in California have been rejected by the defendant W. C. Jacobsen and officers of the Department of Agri-

culture of California under his control for the sole reason that one or more of the avocados in each load or lot failed to meet the 8% oil test. Instances of such rejected shipments made by the plaintiff Florida Lime and Avocado [fol. 13] Growers, Inc. include 1129 lugs of avocados shipped to Safeway Stores at Oakland, California, on November 10, 1955, for which plaintiff was to receive $2,088.65, reshipped to Salt Lake City and sold at net yield to plaintiff of $711.60; 2,083 lugs of avocados shipped November 12, 1955 to Safeway Stores at Sacramento and Oakland, California, for which plaintiff was to receive $3,853.55, reshipped to Portland, Oregon, and sold at net yield to plaintiff of $1,681.03; 2,208 lugs of avocados shipped November 14, 1955 to Safeway Stores at Oakland, California, for which plaintiff was to receive $4,084.80, reshipped to Seattle, Washington, and sold at net yield to plaintiff of $1,788.20; 900 lugs of avocados shipped December 8, 1955, to Mendelson-Zeller Company at Los Angeles, California, for which plaintiff was to receive $2,200, reshipped to El Paso, Texas, and sold at net yield to plaintiff of $548.

XXVII.

The plaintiff South Florida Growers Association, Inc. likewise made shipments of Florida avocados to California which were rejected for alleged oil content under 8% and had to be shipped to other markets. Such avocados were shipped on consignment to plaintiff's sales agent, Calavo, Inc., and after rejection in California reshipped to Phoenix, Arizona, Portland, Oregon, or Seattle, Washington, and sold at prices lower than those obtainable in California, in each instance with added cost of handling and cartage.

XXVIII.

Plaintiffs allege that the sole effect of the 8% oil requirement of section 792 of the Agricultural Code of California, when applied to Florida avocados, is to bar the sale in California by plaintiffs and others of fruit that is mature and wholesome, although of lesser oil content, and to grant a monopoly in the sale of avocados in California to grow- [fol. 14] ers and handlers of avocados that happen to at-

tain 8% or higher oil content, but are not more healthful or edible than avocados which mature with less than 8% oil content; that prohibition of sale in California of Florida avocados solely because of alleged insufficient oil content is an arbitrary and unwarranted obstruction of the free flow of commerce between the states, in violation of article I, section 8, clause 3 of the Constitution of the United States.

XXIX.

Plaintiffs further allege that the denial to plaintiffs of the right to sell in California avocados grown in Florida, when of less than 8% oil content but in no way inimical to the health of the persons who may consume such avocados, while permitting the sale of avocados with 8% or greater oil content but not better fit for consumption, violates the provision of section 1 of the Fourteenth Amendment of the Constitution of the United States that no state shall make or enforce any law which denies to any person within its jurisdiction the equal protection of the laws.

XXX.

Plaintiffs further allege that section 792 of the Agricultural Code of California is unconstitutional, when applied to avocados delivered for sale in interstate commerce in compliance with the procedures and standards established by the Secretary of Agriculture of the United States pursuant to the authority vested in him by the Federal Marketing Agreement Act of 1937, and that the defendants should be enjoined by decree of this court from demanding compliance with different maturity or quality standards as a condition precedent to delivery and sale of such avocados in California.

XXXI.

Because of the arbitrary exclusion of most Florida avo- [fol. 15] cados from the California market, by imposition of the 8% oil test, plaintiffs are limited to sale of their fruit in other markets in competition with the growers and handlers of avocados who enjoy a virtual monopoly in the

California market, at great economic detriment and irreparable loss to plaintiffs.

XXXII.

No practical or adequate remedy is available to plaintiffs in the premises save by the equitable process of injunction.

Wherefore plaintiffs pray:

A. That this case may be heard and determined by a three-judge court, as provided by Title 28 U. S. Code, sections 2281 and 2284.

B. That enforcement of section 792 of the Agricultural Code of California be declared in derogation of article I, section 8, clause 3 of the Constitution of the United States, and of section 1 of the Fourteenth Amendment of the Constitution of the United States, when applied to prohibit delivery and sale in California of avocados grown in Florida and shipped in interstate commerce, solely upon the ground that such avocados have less than 8% oil content.

C. That the court may further adjudicate that prohibition of delivery and sale in California of avocados grown in Florida and shipped in interstate commerce in compliance with the orders and regulations made by the Secretary of Agriculture of the United States, acting pursuant to the authority vested in him by the Federal Marketing Agreement Act of 1937, is an impermissible nullification of the power exercised by Congress under article I, section 8, clause 3 of the Constitution of the United States to regulate commerce among the states.

D. That the defendants and all officers, agents and employees of the State of California under their control may [fol. 16] be restrained by interlocutory and permanent injunction orders of the court from enforcing or attempting to enforce against the plaintiffs the provisions of section 792, chapter 2, division V of the Agricultural Code of California, by any of the methods provided in said chapter for enforcement of section 792, with respect to delivery and sale in California of avocados grown in Florida, when such

enforcement is based upon alleged insufficient oil content of such avocados, or when such enforcement is based upon standards of quality or maturity for such avocados other than the applicable standards established for shipment of such avocados in interstate commerce by the laws of the United States and the regulations made by the Secretary of Agriculture pursuant thereto.

E. That plaintiffs may be granted such other relief in the premises as the court may deem just.

Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, attorney for plaintiffs (Paul H. Leffmann, of Chicago, Illinois, co-attorney for plaintiffs).

Isaac E. Ferguson, attorney for plaintiffs.

[fol. 17] EXHIBIT "A" TO COMPLAINT

(See Opposite) ☞

[fol. 17] EXHIBIT "A" TO COMPLAINT

AVOCADOS

EFFECTIVE JUNE 11, 1954

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

[Regulation Issued pursuant to Act of June 11, 1954]

PART 969—AVOCADOS GROWN IN SOUTH FLORIDA

SUPPORT—ORDER REGULATING HANDLING

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AUTHORITY: §§ 969.0 to 969.71 issued under sec. 5, 49 Stat. 753, as amended; 7 U. S. C. [illegible]

§ 969.0 *Findings and determinations—(a) Findings upon the basis of the hearing record.* Pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U. S. C. 601 et seq.), and the applicable rules of practice and procedure, as amended, effective thereunder (7 CFR, Part 900; 19 F. R. 57), a public hearing was held at Homestead (Modella), Florida, from March 8 to March 11, 1954, both dates inclusive, upon a proposed marketing agreement and a proposed marketing order regulating the handling of avocados grown in South Florida. Upon the basis of the evidence introduced at such hearing, and the record thereof, it is found that:

(1) The said order and all of the terms and conditions thereof will tend to effectuate the declared policy of the act;

(2) The said order regulates the handling of avocados grown in the designated production area in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, the proposed marketing agreement upon which a hearing has been held;

(3) The said order is limited in its application to the smallest regional production area that is practicable, consistently with carrying out the declared policy of the act, and the issuance of several orders applicable to subdivisions of such production area would not effectively carry out the declared policy of the act;

(4) The said order prescribes, so far as practicable, such different terms applicable to different parts of the production area, as are necessary to give due recognition to differences in the production and marketing of avocados covered thereby; and

(5) All handling of avocados grown in the production area, as defined herein, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Additional findings.* It is hereby found and determined on the basis hereinafter indicated that good cause exists for making the provisions of this order effective not later than the date of publication in the Federal Register; and that it would be contrary to the public interest to postpone such effective date until 30 days after publication (60 Stat. 237, 5 U. S. C. 1001 et seq.). As soon as practical after such effective time, it will be necessary to establish the Avocado Administrative Committee, the agency charged with the administration of this program, and for the Avocado Administrative Committee and the Secretary to initiate various actions of both organizational and regulatory natures, including the formulation and promulgation of rules and regulations under the program, which should be completed by the beginning of the harvesting and marketing season. Such season normally starts shortly after the middle of June. The time during which such actions will be concluded should be such that handlers will receive such notice thereof as will enable them reasonably and adequately to prepare for operations under the program. The provisions of the order are well known to the handlers of avocados, since the public hearing in connection with the entire order was concluded March 11, 1953, and the recommended decision and final decision were published in the Federal Register on April 24, 1954 (19 F. R. 2418) and May 21, 1954 (19 F. R. 2784), respectively. Copies of the regulatory provisions of this order were made available to all known interested parties, and compliance with such provisions will not require advance preparation on the part of persons subject thereto which cannot be completed prior to the effective date of regulation pursuant hereto.

(c) *Determinations.* It is hereby determined that:

(1) The marketing agreement regulating the handling of avocados grown in South Florida, upon which the aforesaid public hearing was held, has been executed by handlers, excluding cooperative associations of producers who are not engaged in processing, distributing or shipping avocados covered by this order, who, during the period April 1, 1953, through March 31, 1954, handled not less than 50 percent of the volume of avocados covered by this order;

(2) The issuance of this order is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of its approval and who, during the determined representative period (April 1, 1953, through March 31, 1954), were engaged, within the production area specified in this order, in the production of avocados for market, such producers having also produced for market at least two-thirds of the volume of avocados represented in such referendum.

It is, therefore, ordered, That, on and after the effective date hereof, the handling of avocados grown in the said production area shall be in conformity to, and in compliance with, the terms and conditions of the aforesaid order, and the terms and conditions of said order are as follows:

DEFINITIONS

§ 969.1 *Secretary.* "Secretary" means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or may hereafter be, authorized to exercise the powers and perform the duties of the Secretary of Agriculture of the United States.

§ 969.2 *Act.* "Act" means Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U. S. C. 601 et seq.).

§ 969.3 *Person.* "Person" means an individual, partnership, corporation, association or any other business unit.

§ 969.4 *Production area.* "Production area" means the counties of Brevard, Osceola, Polk, Hillsborough and Pinellas in the State of Florida, and all of the counties of that State situated south of such counties.

§ 969.5 *Avocados.* "Avocados" means all varieties of avocados grown in the production area.

§ 969.6 *Fiscal year.* "Fiscal year" means the twelve-month period ending March 31 of each year.

§ 969.7 *Committee.* "Committee" means the Avocado Administrative Committee established pursuant to § 969.20.

§ 969.8 *Grower.* "Grower" is synonymous with producer and means any person who produces avocados for market and who has a proprietary interest therein.

§ 969.9 *Handler.* "Handler" is synonymous with shipper and means any person (except a common or contract carrier transporting avocados owned by another person) who handles avocados or causes avocados to be handled.

§ 969.10 *Handle.* "Handle" means to sell, consign, deliver, or transport avocados within the production area or between the production area and any point outside thereof in the continental United States or Canada: *Provided*, That such term shall not include: (a) The sale or delivery of avocados to a handler, registered as such with the committee in accordance with such rules and regulations as it may prescribe with the approval of the Secretary, who has facilities within the production area for preparing avocados for market; (b) the delivery of avocados to such a handler solely for the purpose of having such avocados prepared for market; or (c) the transportation of avocados by a handler, so registered with the committee, from the grove to his packing facilities within the production area for the purpose of having such avocados prepared for market. In the event a grower sells his avocados to a handler who is not so registered with the committee, such grower shall be the first handler of such avocados.

§ 969.11 *District.* "District" means the applicable one of the following described subdivisions of the production area:

(a) "District 1" shall include Dade County.

(b) "District 2" shall include all of the production area except Dade County.

ADMINISTRATIVE BODY

§ 969.20 *Establishment and membership.* There is hereby established an Avocado Administrative Committee consisting of nine members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he is an alternate. Five of the members and their respective alternates shall be growers who shall not be handlers or employees of handlers. Four of the members and their respective alternates shall be handlers or employees of handlers. The five members of the committee who shall be growers and who shall not be handlers, or employees of handlers, are hereinafter referred to as "grower" members of the committee; and the four members who shall be handlers, or employees of handlers, are hereinafter referred to as "handler" members of the committee. Four of the five grower members shall be producers of avocados in District 1 and one grower member shall be a producer of avocados in District 2. Three of the four handler members shall be handlers, or employees of handlers, of avocados in District 1, and one handler member shall be a handler, or an employee of a handler, of avocados in District 2.

§ 969.21 *Term of office.* The term of office of each member and alternate member of the committee shall begin April 1 and shall terminate March 31 of the following year. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and qualify and until their respective successors are selected and have qualified. The consecutive terms of office of members shall be limited to three terms.

§ 969.22 *Nomination.*—(a) *Initial members.* Nominations for each of the five initial grower members and four initial handler members of the committee, together with nominations for the initial alternate members for each position, may be submitted to the Secretary by individual growers and handlers. Such nominations may be made by means of group meetings of the growers and handlers concerned in each district. Such nominations, if made, shall be filed with the Secretary no later than ten calendar days prior to the effective date hereof. In the event nominations for initial members and alternate members of the committee are not filed pursuant to, and within the time specified in, this section, the Secretary may select such initial members and alternate members without regard to nominations, but selections shall be on the basis of the representation provided for in § 969.2.

(b) *Successor members.* (1) Nominations for successor members of the committee, and their respective alternates, shall be made at meetings of growers and handlers in each district. Such meetings shall be held at such times (on or before February 15 of each year) and places as the committee shall designate. Such nominations shall be submitted promptly to the Secretary by the committee. The committee shall prescribe procedural rules, not inconsistent with the provisions of this section, for the conduct of such meetings.

(2) Only growers who are present at such nomination meetings, or represented at such nomination meetings by duly authorized agents, shall participate in the nomination and election of nominees for grower members and their alternates. Each grower shall be entitled to cast only one vote for each nominee to be elected in the district in which he produces avocados. No grower shall participate in the election of nominees in more than one district in any one fiscal year.

(3) Only handlers who are present at such nomination meetings, or represented at such meetings by duly authorized agents, shall participate in the nomination and election of nominees for handler members and their alternates. Each handler shall be entitled to cast only one vote for each nominee to be elected in the district in which he handles avocados, which vote shall be weighted by the volume of avocados shipped by such handler during the then current fiscal year. No handler shall participate in the election of nominees in more than one district in any one fiscal year.

§ 969.23 *Selection.* From the nominations made pursuant to § 969.22, or from other qualified persons, the Secretary shall select the five grower members of the committee, the four handler members of the committee, and an alternate for each such member.

§ 969.24 *Failure to nominate.* If nominations are not made within the time and in the manner prescribed in § 969.22, the Secretary may, without regard to nominations, select the members and alternate members of the committee on the basis of the representation provided for in § 969.20.

§ 969.25 *Acceptance.* Any person selected by the Secretary as a member or as an alternate member of the committee shall qualify by filing a written acceptance with the Secretary within ten days after being notified of such selection.

§ 969.26 *Vacancies.* To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate member of the committee to qualify, or in the event of the death, removal, resignation, or disqualification of any member or alternate member of the committee, a successor for the unexpired term of such member or alternate member of the committee shall be nominated and selected in the manner specified in §§ 969.22 and 969.23. If the names of nominees to fill any such vacancy are not made available to the Secretary within fifteen days after such vacancy occurs, the Secretary may fill such vacancy without regard to nominations, which selection shall be made on the basis of representation provided for in § 969.20.

§ 969.27 *Alternate members.* An alternate member of the committee, during the absence or at the request of the member for whom he is an alternate, shall act in the place and stead of such member. In the event of the death, removal, resignation, or disqualification of a member, his alternate shall act for him until a successor for such member is selected and has qualified.

§ 969.28 *Powers.* The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part;

(c) To make and adopt rules and regulations to effectuate the terms and provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 969.29 *Duties.* The committee shall have, among others, the following duties:

(a) To select a chairman and such other officers as may be necessary, and to define the duties of such officers;

(b) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and to define the duties of each;

[fol. 19]

(e) To submit to the Secretary as soon as practicable after the beginning of each fiscal year a budget for such fiscal year, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such fiscal year;

(d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(e) To prepare periodic statements of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;

(f) To cause its books to be audited by a certified public accountant at least once each fiscal year, and at such other times as the Secretary may request;

(g) To act as intermediary between the Secretary and any grower or handler;

(h) To investigate growing and maturity conditions of avocados, and to assemble data in connection therewith;

(i) To engage in such research relating to the determination of maturity and grade standards for avocados as may be approved by the Secretary;

(j) To submit to the Secretary such available information as he may request;

(k) To notify, as provided in this part, producers and handlers of all meetings of the committee to consider recommendations for regulation;

(l) To give the Secretary the same notice of meetings of the committee as is given to its members;

(m) To consult with such representatives of growers or groups of growers as may be deemed necessary and to pay the travel expenses incurred by such representatives in attending committee meetings at the request of the committee: *Provided*, That the committee shall not pay the travel expenses of more than three such representatives in connection with any one meeting of the committee; and

(n) To investigate compliance with the provisions of this part.

§ 969.30 *Procedure.* (a) Six members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require at least five concurring votes: *Provided*, That at least one handler member shall approve the action.

(b) The committee may vote by telegraph, telephone, or other means of communication, and any votes so cast shall be confirmed promptly in writing: *Provided*, That if an assembled meeting is held, all votes shall be cast in person.

§ 969.31 *Expenses and compensation.* The members of the committee, and their respective alternates when acting as members, shall be reimbursed for expenses necessarily incurred by them in the performance of their duties under this part and shall also receive compensation, as determined by the committee, which shall not exceed $10 per day or portion thereof spent in performing such duties.

§ 969.32 *Annual report.* The committee shall, prior to March 31 of each fiscal year, prepare and mail an annual report to the Secretary, and to each handler and grower who requests a copy of the report. This annual report shall contain at least (a) A complete review, by districts, of the regulatory operations during the fiscal year, (b) an appraisal of the effect of such regulatory operations upon the avocado industry, and (c) any recommendations for changes in the program.

EXPENSES AND ASSESSMENTS

§ 969.40 *Expenses.* The committee is authorized to incur such expenses as the Secretary finds are reasonable and may be necessary to enable the committee to exercise its powers and perform its duties in accordance with the provisions of this part during each fiscal year. The funds to cover such expenses shall be acquired by the levying of assessments as provided for in § 969.41.

§ 969.41 *Assessments.* (a) Each person who first handles avocados shall, with respect to the avocados so handled by him, pay to the committee upon demand such person's pro rata share of the expenses which the Secretary finds will be incurred by the committee during each fiscal year. Each such person's share of such expenses shall be equal to the ratio between the total quantity of avocados handled by him as the first handler thereof during the applicable fiscal year, and the total quantity of avocados so handled by all persons during the same fiscal year. The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the rate of assessment to be paid by each such person. At any time during or after the fiscal year, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any finding by the Secretary relative to the expense which may be incurred: *Provided*, That, in no case, shall the rate of assessment exceed 10 cents per 35-pound box, or an equivalent quantity, of avocados. Such increase shall be applied to all avocados handled during the applicable fiscal year. In order to provide funds for the administration of the provisions of this part, the committee may accept the payment of assessments in advance, and may borrow money in any amount not to exceed 10 percent of the estimated expenses set forth in its budget for the then current fiscal year.

§ 969.42 *Accounting.* (a) If, at the end of a fiscal year, the assessments collected are in excess of the expenses incurred, each person entitled to a proportionate refund of the excess assessment shall be credited with such refund against the operations of the following fiscal year. Any handler may demand payment of such a refund, and, the refund shall be paid to him: *Provided*, That any sum paid by a person in excess of his pro rata share of the expenses during any fiscal year may be applied by the committee at the end of such fiscal year to any outstanding obligations due the committee from such person.

(b) All funds received by the committee pursuant to the provisions of this part shall be used solely for the purposes specified in this part and shall be accounted for in the manner provided in this part. The Secretary may, at any time, require the committee and its members to account for all receipts and disbursements.

REGULATIONS

§ 969.50 *Recommendations for regulation.* (a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of avocados grown in District 1 or District 2 in the manner provided in § 969.51, it shall so recommend to the Secretary.

(b) In arriving at its recommendations pursuant to paragraph (a) of this section, the committee shall give consideration to such of the following factors as may be applicable: (1) The estimated total production and shipments of each variety of avocados, including avocados grown in other areas; (2) the time of bloom and growing conditions during the development of the crop; (3) the quality of the avocado crop; (4) the anticipated demand for avocados; and (5) other available information having a bearing on the market for avocados. With each recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated, and such other available information as the Secretary may request.

(c) All meetings of the committee held for the purpose of formulating recommendations for regulations shall be open to growers and handlers. The committee shall give notice of such meetings to growers and handlers by mailing such notice to each grower and handler who has filed his address with the committee and requested such notice.

§ 969.51 *Issuance of regulations.* (a) The Secretary shall regulate, in the manner specified in this section, the handling of avocados whenever he finds, from the recommendations and information submitted by the committee or from other available information, that such regulations will tend to effectuate the declared policy of the act. Such regulations may

(1) Prohibit, prior to such time as shall be specified, the handling of any size or sizes of any variety or varieties of avocados grown in District 1 or District 2, and

(2) Prohibit the handling of any variety or varieties of avocados grown in District 1 or District 2 which do not meet such quality and maturity standards as shall be prescribed.

(b) The committee shall be informed immediately of any such regulations issued by the Secretary and the committee shall promptly give notice thereof to growers and handlers.

§ 969.52 *Modification, suspension, or termination of regulations.* (a) In the event the committee at any time finds that, by reason of changed conditions, any regulations issued pursuant to § 969.51 should be modified, suspended or terminated, it shall so recommend to the Secretary.

(b) Whenever the Secretary finds, from the recommendations and infor-

ation submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of avocados in order to effectuate the declared policy of the act, he shall modify, suspend, or terminate such regulation. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the act, he shall suspend or terminate such regulation. On the same basis and in like manner the Secretary may terminate any such modification or suspension.

§ 969.53 *Exemption certificate.* Whenever a regulation is in effect pursuant to paragraph (a) (1) of § 969.51, the committee shall issue one or more exemption certificates to any person who furnishes proof, satisfactory to the committee, that his avocados of a particular variety are mature prior to the time such variety may be handled under such regulation. Such exemption certificates shall authorize the person to whom the certificates are issued to handle, or have handled, only that portion of his avocados of the particular variety which the committee has determined to be mature. The committee shall adopt, with the approval of the Secretary, procedural rules by which such exemption certificates will be issued and the avocados covered thereunder may be handled. Exemption certificates shall be transferred to the handler of the avocados covered by such certificates at the time the avocados are delivered to such handler.

§ 969.54 *Inspection and certification.* Whenever the handling of any variety of avocados is regulated pursuant to § 969.51, each handler who handles avocados shall, prior thereto, cause each lot of avocados handled to be inspected by the Federal-State Inspection Service and certified by it as meeting the applicable requirements of such regulation: *Provided*, That such inspection and certification shall not be required whenever the avocados previously have been so inspected and certified. Promptly thereafter, each such handler shall submit, or cause to be submitted, to the committee a copy of the certificate of inspection with respect to such handling.

§ 969.55 *Avocados not subject to regulations.* Except as otherwise provided in this section, any person may, without regard to the provisions of §§ 969.41, 969.51, and 969.54, and the regulations issued thereunder, handle avocados (a) for consumption by charitable institutions, (b) for distribution by relief agencies, (c) for export other than to Canada, (d) for commercial processing into products, or (e) in such minimum quantities or types of shipments as the committee, with the approval of the Secretary, may prescribe. The committee shall, with the approval of the Secretary, prescribe such rules, regulations, and safeguards as it may deem necessary to prevent avocados handled under the provisions of this section from entering channels of trade for other than the specific purposes authorized by this section. Such rules, regulations, and safeguards may include the requirements that handlers shall file applications with the committee for authorization to handle avocados pursuant to this section, and that such applications be accompanied by a certification by the intended purchaser or receiver that the avocados will not be used for any purpose not authorized by this section.

§ 969.60 *Reports.* (a) Each handler shall furnish to the committee at such times and for such periods as the committee may designate, certified reports covering, to the extent necessary for the committee to perform its functions, the following: (1) The quantities of each variety of avocados he received; (2) a complete record of the quantities disposed of by him, segregated as to varieties and as to the respective quantities subject to regulation and not subject to regulation; (3) the date of each such disposition and the identification of the carrier transporting such fruit; (4) identification of the inspection certificates and the exemption certificates, if any, pursuant to which the fruit was handled, together with the destination of each such exempted disposition, and of all fruit handled pursuant to § 969.55; and (5) the quantity of each variety held by him at the end of the period.

(b) Upon request of the committee, made with the approval of the Secretary, each handler shall furnish to the committee, in such manner and at such times as it may prescribe, such other information as may be necessary to enable the committee to perform its duties under this part.

MISCELLANEOUS PROVISIONS

§ 969.61 *Compliance.* Except as provided in this part, no person shall handle avocados, the shipment of which have been prohibited by the Secretary in accordance with the provisions of this part, and no person shall handle avocados except in conformity with the provisions of this part and the regulations issued under this part.

§ 969.62 *Right of the Secretary.* The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

§ 969.63 *Effective time.* The provisions of this part shall become effective at such time as the Secretary may declare above his signature to this part, and shall continue in force until terminated in one of the ways specified in § 969.64.

§ 969.64 *Termination.* (a) The Secretary may at any time terminate the provisions of this part by giving at least one day's notice by means of a press release or in any other manner in which he may determine.

(b) The Secretary shall terminate or suspend the operation of any and all of the provisions of this part whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this part at the end of any fiscal year whenever he finds that continuance is not favored by the majority of producers who, during a representative period determined by the Secretary, were engaged in the production of avocados for market: *Provided*, That such termination is announced on or before March 15 of the then current fiscal year. The Secretary shall, as soon as practicable after the close of the fiscal year ending March 31, 1956, conduct a referendum of producers and a poll of handlers to determine whether the continuation of this part is favored by them. Producers entitled to vote in such referendum shall be those who, during the fiscal year ending March 31, 1956, were engaged in producing avocados for market and the poll shall be confined to handlers who handled avocados in that same fiscal year. If it develops from said referendum and poll that (1) less than two-thirds of the producers, by number or volume of production represented in said referendum, favor the continuance of this part, or (2) handlers representing more than one-half the volume of avocados handled favor termination of this part, the Secretary shall thereupon terminate this part.

(d) The provisions of this part shall in any event terminate whenever the provisions of the act authorizing them cease to be in effect.

§ 969.65 *Proceedings after termination.* (a) Upon the termination of the provisions of this part, the committee shall, for the purpose of liquidating the affairs of the committee, continue as trustees of all the funds and property then in its possession, or under its control, including claims for any funds unpaid or property not delivered at the time of such termination.

(b) The said trustees shall (1) continue in such capacity until discharged by the Secretary, (2) from time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the committee and of the trustees, to such persons as the Secretary may direct, and (3) upon the request of the Secretary, execute such assignments or other instruments, necessary or appropriate to vest in such person, full title and right to all of the funds, property, and claims vested in the committee or the trustees pursuant thereto.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this section, shall be subject to the same obligation imposed upon the committee and upon the trustees.

§ 969.66 *Effect of termination or amendment.* Unless otherwise expressly provided by the Secretary, the termination of this part or of any regulation issued pursuant to this part, or the issuance of any amendment to either thereof, shall not (a) affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any pro-

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...ion of this part or any regulation issued under this part, or to release or extinguish any violation of this part or of any regulation issued under this part, or to affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violation.

§ 969.67 *Duration of immunities.* The benefits, privileges, and immunities conferred upon any person by virtue of this part shall cease upon its termination, except with respect to acts done ... and during the existence of this part.

§ 969.68 *Agents.* The Secretary may, by designation in writing, name any officer or employee of the United States, or name any agency or division in the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this part.

§ 969.69 *Derogation.* Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States (a) to exercise any powers granted by the act or otherwise, or (b) in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 969.70 *Personal liability.* No member or alternate member of the committee and no employee or agent of the committee shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, employee, or agent, except for acts of dishonesty, willful misconduct, or gross negligence.

§ 969.71 *Separability.* If any provision of this part is declared invalid or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this part or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

Dated: June 8, 1939.

(SEAL) JOHN H. DAVIS,
Assistant Secretary of Agriculture.

[fol. 22] EXHIBIT "B" TO COMPLAINT

AVOCADO SHIPPING DATES
1957-58 Season
(Issued October 8, 1957)

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2
Trapp	7-29	14	3 9/16	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23
Fairchild	8-26	16	3 10/16	9-9	14	3 7/16	9-23	11	3 2/16	10-7
(Booth 8	9-16	15	3 6/16	9-30	13	3 4/16	10-14	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	10-28	10	2 15/16	11-18
Hirody	9-16	18	3 15/16	9-30	15	3 11/16	10-14	12	3 6/16	11-4
Simpson	9-30	16		10-14	14		10-28	10		11-18
Rue	10-7	30	4 3/16	10-14	24	3 15/16	10-28	18	3 9/16	11-11
E. Prince	10-7	18		10-21	14		11-4	10		11-25
(Lula	10-7	18	3 10/16	10-21	16	3 7/16	11-4	14	3 4/16	
(Lula	--	--	--	--	--	--	11-18	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Sherman	10-14	16		10-28	14		11-11	10		12-2
Vaca	10-14	16	3 9/16	10-28	14	3 7/16	11-11	10	3 0/16	12-2
Marcus	10-14	32								11-25
Hickson	10-21	14	3 4/16	11-4	12	3 1/16	11-18	10	2 15/16	12-9
Collinson	10-21	16	3 11/16	11-4	14	3 8/16	11-18	10	3 1/16	12-9
Avon	10-21	14	3 8/16	11-4	12	3 5/16	11-18	9	2 15/16	12-9
Booth 5	10-21	16	3 10/16	11-4	14	3 9/16	11-18	10	3 3/16	12-9
Blair	10-21	16		11-4			11-18			12-9
Nelson	10-21	14	3 8/16	11-4	12	3 5/16	11-18	10	3 1/16	12-9
Winslowson	10-28	18	3 14/16	11-11	16	3 12/16	11-25	10	3 2/16	12-24
Monroe	10-28	24		11-25	20		12-16	14		1-6
Hall	10-21	24	3 13/16	11-4	18	3 7/16	12-2	14	3 3/16	12-24
Herman	11-4	16	3 9/16	11-18	14	3 7/16	12-2	10	3 1/16	12-24
Booth 10	11-4	16		11-18	14		12-2	10		12-24
Booth 11	10-28	16	3 12/16	11-11	14	3 9/16	12-2	10	3 3/16	12-24
Ajax(B. 78)	11-11	18	3 12/16	11-25	15	3 9/16	12-9	11	3 3/16	12-31
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-31
Booth 1	11-18	16	3 11/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Taylor	11-18	14	3 4/16	12-2	12	3 2/16	12-16	9	2 13/16	1-6
Dunedin	11-18	16	3 10/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Choquette	10-28	30	4 5/16	11-18	22	3 15/16	12-2	12	3 11/16	1-6
Linda	12-9	18		12-23	15		1-6	12		1-20
Byers #1	12-9	16		12-23	14		1-6	10		1-27
Nabal	12-9	14	3 8/16	12-23	12	3 5/16	1-6	9	3 0/16	1-27
Wagner	12-16	12	3 5/16	12-30	10	3 2/16	1-13	8	2 14/16	2-3
Schmidt	1-27	16		2-10	14					2-24
Itzamna	2-24									2-24

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight on or after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations

West Indian Type: None to be shipped before June 3
June 3 to June 17, none smaller than 16 oz.
June 17 to July 15, none smaller than 14 oz.
July 15 to Sept. 9, none smaller than 12 oz.
On or after Sept. 9, no size restrictions

Guatemalan Type and Guatemalan x W. Indian Hybrids: None to be shipped before Sept. 9
Sept. 9 to Oct. 7, none smaller than 14 oz.
Oct. 7 to Dec. 23, none smaller than 12 oz.
On or after Dec. 23, no size restrictions

Exceptions applicable to seedlings and unlisted varieties: Avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

[fol. 23] EXHIBIT "C" TO COMPLAINT

FLORIDA AVOCADO ORDER 69
AS AMENDED

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

AVOCADO ADMINISTRATIVE COMMITTEE RULES AND REGULATIONS
GRADE STANDARDS AS AMENDED

[Reprinted from the Federal Register of April 13, 1966]

§ 969.136 *Quality regulations.* Quality regulations recommended and established pursuant to § 969.50 shall be on the basis of the following specifications or appropriate modifications thereof:

(a) *No. 1 grade.* "No. 1 grade" consists of avocados of similar varietal characteristics which are mature but not overripe, well formed, clean, well colored, well trimmed, and which are free from decay, anthracnose, freezing injury and free from damage caused by bruises, cuts or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, or mechanical or other means. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of this grade: *Provided*, That not more than one-half of this amount, or 5 percent, may be affected by anthracnose or decay, including therein not more than 1 percent for decay. (See Application of Tolerances and Standard Pack Requirements.)

(b) *Combination grade.* Any lot of avocados may be designated "Combination grade" when not less than 60 percent, by count, of the avocados in each container meet the requirements of the No. 1 grade and the remainder meet the requirements of the No. 2 grade. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of the No. 2 grade: *Provided*, That not more than one-half of this amount, or 5 percent, may be affected by anthracnose or decay, including therein not more than 1 percent for decay. No part of any tolerance shall be allowed to reduce for the lot as a whole the percentage of No. 1 fruit required or specified in the combination, but individual containers may have not more than 10 percent less than the percentage of No. 1 fruit required or specified. (See Application of Tolerances and Standard Pack Requirements.)

(c) *No. 2 grade.* "No. 2 grade" consists of avocados of similar varietal characteristics which are mature but not overripe, fairly well formed, clean, fairly well colored, well trimmed and which are free from decay, freezing injury and free from serious damage caused by anthracnose, bruises, cuts or other skin breaks, pulled stems, russetting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects or mechanical or other means. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of this grade: *Provided*, That not more than one-half of this amount, or 5 percent, shall be allowed for serious damage by anthracnose or decay, including therein not more than 1 percent for decay. (See Application of Tolerances and Standard Pack Requirements.)

(d) *No. 3 grade.* "No. 3 grade" consists of avocados of similar varietal characteristics which are mature but not overripe, which are not badly misshapen, and which are free from decay and free from serious damage caused by anthracnose and from very serious damage caused by freezing injury, bruises, cuts or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, dirt, or mechanical or other means. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of this grade, including therein not more than 2 percent of decay. (See Application of Tolerances and Standard Pack Requirements.)

(e) *Unclassified.* "Unclassified" consists of avocados which have not been classified in accordance with any of the foregoing grades. The term "unclassified" is not a grade, as used herein, but is provided as a designation to show that no grade has been applied to the lot.

(f) *Standard pack.* (1) The avocados shall be packed in accordance with good commercial practice and the pack shall be at least fairly tight. The size of the avocados may be specified by count. The weight of the smallest fruit in a container shall be not less than 75 percent of the weight of the largest fruit.

(2) In order to allow for variation incident to proper packing and sizing, not more than 9 percent of the containers may fail to meet the requirements for fairly tight. And not more than 5 percent, by count, of the avocados in any container may weigh less than 75 percent of the weight of the largest fruit: *Provided*, That no fruit, in any container, shall be less than 60 percent of the weight of the largest fruit.

(g) *Application of tolerances.* The contents of individual packages in the lot, based on sample inspection, are subject to the following limitations: *Provided*, That the averages for the entire lot are within the tolerances specified for the grade.

(1) For packages which contain more than 30 avocados and a tolerance of 10 percent or more is provided, individual packages in any lot shall have not more than one and one-half times the tolerance specified. For packages which contain more than 20 avocados and a tolerance of less than 10 percent is provided, individual packages in any lot shall have not more than double the tolerance specified, except that at least one defective and one off-size specimen may be permitted in any package.

(2) For packages which contain 20 avocados or less, individual packages shall have not more than double the tolerance specified, except that at least one defective and one off-size specimen may be permitted in any package.

(h) *Definitions.*—(1) *Similar varietal characteristics.* "Similar varietal characteristics" means that the avocados in any container are similar in shape, texture and color of skin and flesh.

(2) *Mature.* "Mature" means that the avocado has reached a stage of growth which will insure a proper completion of the ripening process.

(3) *Overripe.* "Overripe" means that the avocado is dead ripe with flesh soft or discolored and past commercial use.

(4) *Well formed.* "Well formed" means that the avocado has the normal shape characteristic of the variety.

(5) *Clean.* "Clean" means that the avocado is practically free from dirt, staining or other foreign material.

(6) *Well colored.* "Well colored" means that the avocado has the color characteristic of the variety.

(7) *Well trimmed.* "Well trimmed" means that the stem, when present, is cut off fairly smoothly at a point not more than one-fourth inch beyond the shoulder of the avocado.

(8) *Damage.* "Damage" means any defect which materially affects the appearance, or the edible or shipping quality of the individual fruit or the general appearance of the fruits in the container. Any one of the following defects, or any combination of defects the seriousness of which exceeds the maximum allowed for any one defect, shall be considered as damage:

(i) Cuts or other skin breaks when not healed and penetrating beneath the epidermis or the aggregate area exceeds the area of a rectangle one inch in length and one-eighth inch in width; or when healed and the appearance is materially affected.

(ii) Pulled stems when the exposed stem cavity is excessively deep, or when skin surrounding the stem cavity is more than slightly torn.

(iii) Russeting or similar discolorations when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown surface discoloration aggregat-

ing 10 percent of the fruit surface.

(iv) Scars or scab when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 10 percent of the fruit surface.

(v) Sunburn when the appearance of the avocado is affected to a greater extent than that of an avocado which has greenish-yellow colored sunbugn aggregated 10 percent of the fruit surface.

(vi) Sunscald or sprayburn when not well-healed, or when soft, or when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 10 percent of the fruit surface.

(9) *Fairly well formed.* "Fairly well formed" means that the avocado may be slightly abnormal in shape but not to the extent that the appearance is seriously affected.

(10) *Fairly well colored.* "Fairly well colored" means that the avocado shows a shade of color which is fairly characteristic of the variety.

(11) *Serious damage.* "Serious damage" means any defect which seriously affects the appearance, or the edible or shipping quality of the individual fruit, or the general appearance of the avocados in the container. Any one of the following defects, or any combination of defects, the seriousness of which exceeds the maximum allowed for any one defect, shall be considered as serious damage:

(i) Anthracnose when any spot exceeds the area of a circle one-fourth inch in diameter, or when more than 3 spots each exceeding the area of a circle three-sixteenths inch in diameter.

(ii) Cuts or other skin breaks when not healed and the aggregate area exceeds the area of a rectangle one inch in length and one-fourth inch in width, or when not healed and penetrating into the flesh of the fruit, or when healed and the appearance is seriously affected.

(iii) Pulled stems when the skin surrounding the exposed stem cavity is torn more than an aggregate area of a circle one-fourth inch in diameter, or when flesh is torn.

(iv) Russeting or similar discoloration when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown surface discoloration aggregating 25 percent of the fruit surface.

(v) Scars or scab when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 25 percent of the fruit surface.

(vi) Sunburn when the appearance of the avocado is affected to a greater extent than that of an avocado which has greenish-yellow colored sunburn aggregating 25 percent of the fruit surface.

(vii) Sunscald or sprayburn when not well-healed, or when soft, or when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 25 percent of the fruit surface.

(viii) Cercospora spot when any spot exceeds the area of a circle ¼ inch in diameter or when more than three spots each of which exceeds the area of a circle $\frac{1}{16}$ inch in diameter, or when the aggregate area of all spots exceeds the area of a circle 1 inch in diameter.

(12) *Badly misshapen.* "Badly misshapen" means that the avocado is so badly curved, constricted, pointed or otherwise deformed that the appearance is very seriously affected.

(13) *Very serious damage.* "Very serious damage" means any defect which very seriously affects the appearance or the edible or shipping quality of the avocado. Any one of the following defects or any combination of defects, the seriousness of which exceeds the maximum allowed for any one defect, shall be considered as very serious damage:

(i) Cuts or other skin breaks when not healed and penetrating into the flesh of the fruit, or any skin break not seriously affecting the appearance, or the edible or shipping quality.

(ii) Pulled stems when the skin surrounding the exposed stem cavity is torn more than an aggregate area of a circle one-half inch in diameter, or when the flesh is torn.

(iii) Russeting or similar discoloration when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown surface discoloration aggregating 50 percent of the fruit surface.

(iv) Scars or scab when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial fairly smooth scars aggregating 50 per cent of the fruit surface.

(v) Sunburn when the appearance of the avocado is affected to a greater extent than that of an avocado which has greenish-yellow colored sunburn aggregating 50 per cent of the fruit surface.

(vi) Sunscald or sprayburn when not well healed, or when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 50 per cent of the fruit surface.

[fol. 26] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ANSWER—Filed December 6, 1957

Come now W. C. Jacobsen, Director of Agriculture, State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General, State of California, and for their causes of defense allege as follows:

First Defense

That the complaint fails to state a claim against these answering defendants upon which relief can be granted.

[fol. 27]

Second Defense

That the above-entitled court lacks jurisdiction over the subject matter set forth in plaintiffs' complaint, or at all.

Third Defense

That these answering defendants admit the allegations contained in paragraphs II, V, VI, VIII, IX, X, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' complaint; that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VII, XII, XIII, XIV, XXII, XXIV (being paragraph numbered XXIV and appearing on lines 16 to 24, page 11, plaintiffs' complaint), and XXVII of plaintiffs' complaint and on said ground deny the truth of each and every allegation contained in said paragraphs; that these answering defendants deny each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV (being paragraph numbered XXIV and appearing on lines 26 to 32, page 11, and lines 1 to 10, page 12, plaintiffs' complaint), XXVIII, XXIX, XXX, XXXI, and XXXII of plaintiffs' complaint; that these answering defendants admit the allegations contained in lines 29 to 32,

page 7, and lines 1 to 10, page 8, ending with "February," of paragraph XV of plaintiffs' complaint, and deny each and every allegation contained in lines 10 to 19, page 8, beginning with "Thus" on line 10, page 8, and ending with "California" on line 19, page 8, of paragraph XV of plaintiffs' complaint; that these answering defendants deny each and every allegation contained in paragraph XXVI of plaintiffs' complaint excepting that defendants admit that they have in the past and now stand ready to perform their duties under their oath of office should they acquire knowledge of violations of the Agricultural Code of the State of California.

[fol. 28] Fourth Defense

That the federal courts have adopted the salutary policy of judicial self-restraint in suspending or enjoining enforcement of state statutes alleged to be unconstitutional on the ground that a complainant might be civilly or criminally prosecuted for violation of them, where the state court, which has the last word on the construction and meaning of the statute, has never passed upon the statute attached. In the absence of a showing that the danger of irreparable loss is both great and immediate, plaintiffs herein should first set up the invalidity of the statute in the state court, even though the validity of the statute is challenged, since there is ample opportunity for ultimate review by the United States Supreme Court of federal questions after decision by the state court.

Fifth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing of immature, unwholesome avocados, thus maintaining the industry reputation and consumer and trade market demand for mature, wholesome, nutritious avocados.

Wherefore, defendants pray:

1. That the plaintiffs' complaint be dismissed;

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, deliv- [fol. 29] ered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California.

3. That the defendants be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendants their costs.

Dated: December 6, 1957.

Edmund G. Brown, Attorney General of the State of California; John Fourt, Deputy Attorney General. By John Fourt, Attorneys for Defendants.

[fol. 30] Affidavit of Service by Mail (omitted in printing).

[fol. 33] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

REQUEST TO SET ACTION FOR TRIAL—Filed February 24, 1958

The plaintiffs herein request the court to set the above-entitled action for trial at the early convenience of the court and represent to the court as follows:

1. The plaintiffs are handlers of avocados grown in Florida and the relief sought by the plaintiffs in this action is to restrain enforcement by the defendants of section 792 of the Agricultural Code of California with respect to such avocados shipped into California in interstate commerce. (Complaint—paragraphs I, II, III, IV, XVII, XIX, XXI, XXXII.)

2. Because of the nature of the action, trial by a three-judge court is required. (Title 28 USCA, section 2281.)

3. Plaintiffs contend that enforcement of section 792 of the Agricultural Code of California, when applied to the [fol. 34] avocados handled by plaintiffs, restricts the marketing of such avocados in violation of the Constitution of the United States, with resultant economic detriment and irreparable loss to plaintiffs. (Complaint—paragraphs III, XXVIII, XXIX, XXX, XXXI.)

4. The next marketing season for the avocados handled by plaintiffs commences about July 1, 1958, therefore the action is of emergency nature.

5. Depositions of four witnesses have been taken on behalf of plaintiffs and of one witness on behalf of defendants, and neither plaintiffs nor defendants have given notice of intention to take further depositions.

6. Interrogatories, requests for admissions and other discovery procedure, to the extent not disposed of at the time of the presentation of this motion, can reasonably be completed within such limited time thereafter as the court may order.

7. This request to set the action for trial is made in lieu an application by plaintiffs for an interlocutory injunction, since a hearing of such application may be obviated by plenary trial of the action and entry of a final decree.

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

INTERROGATORIES PROPOUNDED BY PLAINTIFFS TO THE DEFENDANT W. C. JACOBSEN—Filed February 24, 1958

Pursuant to rule 33 of the Rules of Civil Procedure for the United States District courts, the defendant W. C. Jacobsen, Director of the Department of Agriculture of the State of California, is hereby requested by the plaintiffs herein to answer under oath within the time provided by said rule 33 each of the following interrogatories:

Interrogatory No. 1

Does the California Department of Agriculture maintain a Bureau of Agricultural Statistics, a Bureau of Market News, and a Crop and Livestock Reporting Service, and if so what are the functions of these bureaus and services?

[fol. 36] Interrogatory No. 2

Does the Department of Agriculture of California, either alone or jointly with the United States Department of Agriculture, keep records of the quantities of various crops produced in California, in particular fruit crops, the quantities of each such crop received and unloaded at wholesale markets within the state, and the quantities of each such crop shipped out of the state?

Interrogatory No. 3

With particular reference to avocados grown in California, do the records of the California Department of Agriculture account for all such avocados received and unloaded at wholesale markets within the state, or only a portion thereof?

Interrogatory No. 4

In the three years from October 1, 1954 to September 30, 1957, what were the monthly receipts and unloads of avocados at the Los Angeles, Oakland and San Francisco wholesale markets, so far as shown by the records of the California Department of Agriculture (or records kept by the joint Federal-State Market News Service)?

Interrogatory No. 5

In each month of the three-year period from October 1, 1954 to September 30, 1957, what quantities of avocados grown in California were shipped out of the state, so far as shown by the aforesaid records?

Interrogatory No. 6

If the answers to Interrogatories Nos. 4 and 5 are given in carlot equivalents, by what mathematical formula are carlots convertible into tons?

Interrogatory No. 7

What was the total production of avocados in California in the crops years 1954-1955, 1955-1956 and 1956-1957, as shown by the crop production records of the California [fol. 37] Department of Agriculture (or records kept jointly by the United States Department of Agriculture and the California Department of Agriculture)?

Interrogatory No. 8

What was the total production of avocados in California, and the percentage of such production to the total production of avocados in the United States, as shown by the aforesaid records, in the 10-year period from 1945 to 1954, also in each of the crop years 1954-1955, 1955-1956 and 1956-1957?

Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, attorney for plaintiffs.

Acknowledgment of service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ANSWERS OF DEFENDANT W. C. JACOBSEN TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS—Filed March 6, 1958

Answer to Interrogatory No. 1:

The California Department of Agriculture maintains a Bureau of Agricultural Statistics. This Bureau is a part of the California Crop and Livestock Reporting Service, which is supported jointly under a cooperative agreement between the California Department of Agriculture and the United States Department of Agriculture. The function of the California Crop and Livestock Reporting Service is to collect, analyze and publish statistical data for the State of California relating to the production, price, value, stocks, [fol. 39] and utilization of crops, livestock and other agricultural products of California. Estimates of State totals and averages for the above items have been designated as part of the Federal program of Agricultural Statistics of the United States Department of Agriculture. As such, these estimates are compiled in accordance with the established policies and procedures of the Crop Reporting Board of the United States Department of Agriculture, and are approved by the said Crop Reporting Board before release.

The California Department of Agriculture also maintains a Bureau of Market News. This work is carried on under a cooperative agreement between the California Department of Agriculture and the United States Department of Agriculture under the official operating title of "Federal-State Market News Service." The function of the Federal Market News Service is to collect and disseminate current information relative to market prices, supply, demand, shipping movement and storage of agricultural commodities.

Answer to Interrogatory No. 2:

The California Crop and Livestock Reporting Service prepares estimates of quantities of the principal crops, including avocados and other fruit crops, produced in California. Such estimates of the total production for the State of California are approved by the Crop Reporting Board of the United States Department of Agriculture before release and publication, and are authorized as the official estimates for the State by the California Department of Agriculture and by the United States Department of Agriculture.

The Federal-State Market News Service compiles receipts and unload records which show the quantities of [fol. 40] certain fruits and vegetables unloaded in the wholesale terminal market centers at Los Angeles, San Francisco, Oakland, and at other wholesale locations in these metropolitan areas as are practicable to be tabulated. The Federal-State Market News Service does not keep records of quantities of fruits and vegetables unloaded at other wholesale markets within the State. The Federal-State Market News Service keeps records on the quantity of about 45 different fruits and vegetables shipped by rail, but these records do not include avocados. The Federal-State Market News Service keeps records on the quantity of about 33 different fruits and vegetables shipped out of state by truck. Records are kept on the quantity of avocados shipped out of state by truck.

Answer to Interrogatory No. 3:

With reference to avocados grown in California, the records of the Federal-State Market News Service do not account for all avocados grown in California and received and unloaded at wholesale markets within the State, but only account for a portion thereof. As a part of a national program, the avocado unload records which are compiled at the Los Angeles, San Francisco and Oakland wholesale market centers are designed to measure the quantities of avocados entering the wholesale market channels at the specific market centers for which such data are tabulated.

On that basis, the unload data are believed to be substantially complete, but the Federal-State Market News Service makes no claim that the unload data for these specific markets measure the total quantities entering consumption channels. The purpose of the unload data at these three wholesale market centers is to provide buyers and sellers with a timely measure of supply available for trading each [fol. 41] day. The Federal-State Market News Service does not compile records of receipts or unloads of California-grown avocados at any other points in the State of California.

Answer to Interrogatory No. 4:

The attached tables Numbered 1, 2, and 3 show unloads of avocados at Los Angeles, San Francisco, and Oakland for the period October 1, 1954, through September 30, 1957, by months. These tables were prepared from the 1954, 1955, 1956, and 1957 annual reports entitled "Unloads of Fresh Fruits and Vegetables" issued by the Los Angeles and San Francisco offices of the Federal-State Market News Service.

Answer to Interrogatory No. 5:

Since records of rail shipments of avocados are not maintained by the Federal-State Market News Service, the California Department of Agriculture cannot submit complete information showing quantities of California-grown avocados shipped out of the State of California. The information available is limited to the quantities of avocados shipped out of the State of California by truck. Table 4 attached shows the truck shipments of avocados out of the State of California.

Answer to Interrogatory No. 6:

As indicated above, the answers to Interrogatories Nos. 4 and 5 are given in carlot equivalents. The California Department of Agriculture does not have an official mathematical formula by which carlots are converted to tons. The basic unit used by the Federal-State Market News Service to measure volume of fresh fruits and vegetables moving to market is in terms of rail cars. Quantities of

fresh fruits and vegetables arriving at terminal markets by [fol. 42] motor truck are first tabulated in terms of numbers of packages. The numbers of the various types of packages are converted to rail carlot equivalents to provide a unit of measure comparable with the rail shipments. Some quantities of fresh fruits and vegetables are received at terminal markets in loose unpacked form. The weight of these loose unpacked commodities is converted to an equivalent number of a standard container, which in turn is converted to carlot equivalents.

The factors for converting the quantity of fresh fruits and vegetables arriving at terminal markets by motor truck are established by the United States Department of Agriculture to provide a uniform nationwide unit of measure. The conversion factors for avocados are listed below. The Federal-State Market News Service does not attempt to convert packed California flats or Los Angeles lugs of avocados into pounds or tons per car.

California Avocados

California Flat (3¾" or 4½ x 13½" x 16⅛")—	1,750 per carlot
L.A. Lug	900 " "

Loose unpacked avocados
13 pounds per California Flat
25 pounds per L.A. Lug

Florida Avocados

Florida Flat, (3¾" x 11½" x 14")	1,300 per carlot

The quantities of avocados shipped out of the State of California by motor truck are tabulated in terms of numbers of packages with no segregation as to the type of package. Considering an approximate average of all types of packages most commonly used, the Federal-State Market News [fol. 43] Service has determined that 1,600 packages of avocados shipped out of the State by motor truck would be approximately equal to one rail carlot.

On the basis of the above weights per container and conversion factors, one carlot equivalent would be equal to approximately 11.3 tons of avocados.

Answer to Interrogatory No. 7:

According to the published records of the Crop Reporting Board of the United States Department of Agriculture, the total production of avocados in California for the crop years 1954-55, 1955-56, and 1956-57, were as follows:

Crop Year	*Production of Avocados in California*
1954-55	45,200 tons
1955-56	20,000 tons
1956-57	14,700 tons

Answer to Interrogatory No. 8:

According to the published records of the Crop Reporting Board of the United States Department of Agriculture, the total production of avocados in California and the United States for the crop years 1944-45 to 1956-57 and the percentage California production was of United States production for these crop years is as follows:

[fol. 44]

	Production of Avocados in:		*California Production as a Percentage of United States Production*
Crop Year	*California Tons*	*United States Tons*	*Percent*
1944-45	11,600	17,400	67
1945-46	24,000	27,200	88
1946-47	18,500	20,100	92
1947-48	18,600	20,900	89
1948-49	14,400	17,500	82
1949-50	15,500	20,500	76
1950-51	22,400	27,900	80
1951-52	28,000	34,500	81
1952-53	23,200	31,900	73
1953-54	21,300	31,900	67
Total above 10 Years	197,500	249,800	79
1954-55	45,200	57,000	79
1955-56	20,000	34,300	58
1956-57	14,700	25,500	58

As stated in Interrogatory No. 1, the estimates of the Crop Reporting Board for the State of California are recognized as the official estimates for California by the Director of Agriculture, State of California.

W. C. Jacobsen

Subscribed and sworn to before me this 6th day of March, 1958.

(Seal)

Anne Marie Wise, Notary Public in and for the County of Sacramento, State of California.

My Commission Expires February 25, 1960.

[fol. 45]

TABLE NO. 1

Unloads of Avocados at Los Angeles, San Francisco, and Oakland by Months, October 1954-September 1955 Inclusive

Origin	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Total
	— *Carlot Equivalents*[1] —												
Los Angeles Unloads:													
Rail—none													
Truck													
California													
Local	14	34	58	83	49	77	52	39	43	29	25	60	563
San Diego County	14	26	60	47	112	162	147	129	89	42	37	29	794
S.Barb-SLO	—	—	—	—	—	—	—	—	10	2	33	7	52
Total California	28	60	118	130	161	239	199	168	142	73	95	96	1,509
Florida	—	11	1	—	—	—	—	—	—	—	—	—	12
Grand Total 1954-55	28	71	119	130	161	239	199	168	142	73	95	96	1,521
San Francisco Unloads:													
Rail—none													
Truck													
California													
Wholesale Market													
L.A. Local District	1	5	7	5	4	9	7	5	7	3	12	3	68
San Diego County	7	9	10	17	9	15	11	13	9	10	4	8	122
Farmers' Market													
San Diego County	—	—	—	—	—	1	1	—	—	—	—	—	2
Total California	8	14	17	22	13	25	19	18	16	13	16	11	192
Florida	2	11	—	—	—	—	—	—	—	—	—	—	13
Grand Total 1954-55	10	25	17	22	13	25	19	18	16	13	16	11	205
Oakland Unloads:													
Rail—none													
Truck													
California													
L.A. Local District	1	1	2	4	3	2	6	6	1	3	5	1	35
San Diego County	4	6	12	15	10	23	11	12	16	10	8	10	137
Total California	5	7	14	19	13	25	17	18	17	13	13	11	172
Florida	2	18	—	—	—	—	—	—	—	—	—	—	20
Grand Total 1954-55	7	25	14	19	13	25	17	18	17	13	13	11	192

1 Basis: California Flat (3¾ or 4½x13½x16 1/8) 1,750; L.A. Lug 900; Florida Flat (3¾x11½x14) 1,300 per carlot.

Source: Unload reports for Los Angeles, San Francisco, and Oakland issued by the Federal State Market News Service.

Federal-State Market News Service
1220 N Street
Sacramento 14, California
February 21, 1958

[fol. 46]

TABLE NO. 2

Unloads of Avocados at Los Angeles, San Francisco, and Oakland by Months, October 1955-September 1956 Inclusive

Origin	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Tota
						—*Carlot Equivalents*[1]—							
Los Angeles Unloads:													
Rail—none													
Truck													
California													
Local	37	25	21	47	19	16	13	12	10	12	20	15	24
San Diego County	20	28	40	17	63	68	70	49	25	20	14	7	42
S.Barb-SLO	11	3	1	1	—	1	1	5	4	4	10	13	5
Total California	68	56	62	65	82	85	84	66	39	36	44	35	72
Florida	—	6	2	8	—	—	—	—	—	—	—	—	1
Grand Total 1955-56	68	62	64	73	82	85	84	66	39	36	44	35	73
San Francisco Unloads:													
Rail—none													
Truck													
California													
Wholesale Market													
L.A. Local District	3	4	2	2	3	3	2	3	1	3	6	1	3
San Diego County	7	5	7	10	9	10	10	10	4	4	1	4	8
Farmers' Market													
San Diego County	—	—	—	—	—	—	—	—	—	—	—	—	—
Total California	10	9	9	12	12	13	12	13	5	7	7	5	11
Florida	—	4	5	4	—	—	—	—	—	—	—	—	1
Grand Total 1955-56	10	13	14	16	12	13	12	13	5	7	7	5	12
Oakland Unloads:													
Rail—none													
Truck													
California													
L.A. Local District	1	1	—	—	1	2	2	2	1	2	1	1	1
San Diego County	8	10	9	9	12	11	10	11	4	4	4	5	9
Total California	9	11	9	9	13	13	12	13	5	6	5	6	11
Florida	—	6	5	4	—	—	—	—	—	—	—	—	1
Grand Total 1955-56	10	15	14	16	12	13	12	13	5	7	7	5	12

1 Basis: California Flat (3¾ or 4½x13½x16 1/8) 1,750; L.A. Lug 900; Florida Flat (3¾x11½x14) 1,300 per carlot.

Source: Unload reports for Los Angeles, San Francisco, and Oakland issued by the Federal State Market News Service.

Federal-State Market News Service
1220 N Street
Sacramento 14, California
February 21, 1958

[fol. 47]

TABLE NO. 3

Unloads of Avocados at Los Angeles, San Francisco, and Oakland by Months, October 1956-September 1957 Inclusive

Origin	Oct.	Nov	Dec	Jan.	Feb.	Mar.	Apr	May	June	July	Aug	Sept.	Total
						—Carlot Equivalents—							
Los Angeles Unloads:													
Rail—none													
Truck													
California													
Local	19	9	15	—	—	—	—	—	—	—	—	—	43
L.A. District	—	—	—	14	11	9	8	12	11	9	2	11	87
San Diego County	8	21	33	53	68	83	56	41	38	39	24	23	487
S.Barb-SLO	18	—	1	—	—	—	—	—	—	—	—	—	19
SLO-S.Barb-Vent.	—	—	—	1	5	6	5	7	10	17	14	16	81
Total California	45	30	49	68	84	98	69	60	59	65	40	50	717
Florida	—	5	9	11	1	—	—	—	—	—	—	—	26
Grand Total 1956-57	45	35	58	79	85	93	69	60	59	65	40	50	743
San Francisco Unloads:													
Rail—none													
Truck													
California													
Wholesale Market													
L.A. Local District	1	2	2	—	—	—	—	—	—	—	—	—	5
Los Angeles District	—	—	—	2	4	2	3	3	3	4	—	1	22
San Diego County	3	3	5	7	13	11	12	8	7	6	2	1	78
SLO-S.Barb-Vent.	—	—	—	—	—	—	—	—	—	—	4	4	8
Farmers' Market													
San Diego County	—	—	—	—	—	—	—	—	—	—	—	—	—
Total California	4	5	7	9	17	13	15	11	10	10	6	6	113
Florida	—	2	9	—	—	—	—	—	—	—	—	—	11
Grand Total 1956-57	4	7	16	9	17	13	15	11	10	10	6	6	124
Oakland Unloads:													
Rail—none													
Truck													
California													
L.A. Local District	1	2	1	—	—	—	—	—	—	—	—	—	4
Los Angeles District	—	—	—	1	3	2	3	3	2	—	—	1	15

Oakland Unloads (Continued):

Truck (Continued)													
San Diego County	6	4	6	6	10	8	9	6	5	8	2	1	7
SLO-S.Barb-Vent.	—	—	—	—	—	—	—	—	—	6	2	3	1
Total California	7	6	7	7	13	10	12	9	7	14	4	5	10
Florida	—	4	15	8	—	—	—	—	—	—	—	—	2
Grand Total 1956-57	7	10	22	15	13	10	12	9	7	14	4	5	12

1 Basis: California Flat (3¾ or 4½x13½x16 1/8) 1,750; L.A. Lug 900; Florida Fla (3¾x12½x14) 1,300 per carlot.

Source: Unload reports for Los Angeles, San Francisco, and Oakland issued by the Federal State Market News Service.

Federal-State Market News Service
1220 N Street
Sacramento 14, California
February 21, 1958

[fol. 48]

TABLE NO. 4

Outbound Truck Passings of Avocados Through California Border Stations

October 1954-September 1957 Inclusive

	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Tot
	— *Carlot Equivalents*[1] —												
1954-55	24	26	44	79	91	124	115	109	90	54	48	42	84
1955-56	35	29	35	40	54	71	56	48	31	15	17	16	44
1956-57	13	11	15	28	31	45	44	38	33	23	18	16	31

1 Basis: Lugs and Flats 1,600 per carlot.

Source: Outbound Truck Passings reports issued by Federal-State Market News Service, Sacramento, California.

[fol. 49] Affidavit of Service by Mail (omitted in printing).

[fol. 52]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

MOTION TO AMEND ANSWER AND REQUEST THAT COURT AMEND COMPLAINT—Filed February 26, 1958

Defendants above named respectfully request permission of the above-entitled court to file their amended answer and request the court to amend the complaint by interlineation. Plaintiffs' complaint, on page 11, contains two paragraphs "XXIV." Defendants respectfully request that the court add the letter "(a)" to paragraph "XXIV" on line 15, page 11, and the letter "(b)" to paragraph "XXIV" on line 25, page 11. Defendants' proposed amended answer denies the allegations set forth in the proposed amended complaint as paragraphs XXIV(a) and XXIV(b) and [fol. 53] in addition denies the allegations of paragraph XXV for lack of information and belief. In addition, the amended answer sets forth a new and separate Fifth Defense, which alleges that the quality and maturity standards promulgated under Marketing Order No. 69 governing avocados grown in South Florida and the promulgation methods and procedures used in the administration thereof are invalid in that they do not comply with the requirements of the Marketing Agreement Act of 1937.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for defendants.

Points and Authorities

Rule 15, Federal Rules of Civil Procedure:

". . . ; and leave shall be freely given [to amend pleadings] when justice so requires."

Downey v. *Palmer*, 27 Fed. Supp. 993 (answer amended to set up additional defense of statute of limitations).

American Optical Company v. *New Jersey Optical Company*, 50 Fed. Supp. 806 (answer amended to set up additional defense of invalidity of patents).

[fol. 60] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

NOTICE OF MOTION FOR DISMISSAL AS TO FLORIDA LIME AND AVOCADO GROWERS, INC. OR ALTERNATIVELY FOR STAY OF PROCEEDINGS—Filed March 14, 1958

To: Plaintiff, Florida Lime and Avocado Growers, Inc., and To: Isaac E. Ferguson, Esq., Its Attorney:

You, and Each of You, Will Please Take Notice that on Monday, April 7, 1958, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, the defendants above named will move the above-entitled Court for its order dismissing the above-entitled action as to said plaintiff on the following grounds:

I

That plaintiff's complaint fails to allege facts showing a cause of action as to said plaintiff within the equity [fol. 61] jurisdiction of the Federal District Court.

II

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the matter in controversy exceeds the

sum or value of $3,000, exclusive of interests and costs within the purview of 28 U.S.C. 1331.

III

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the action or proceeding arises under any Act of Congress regulating commerce within the purview of 28 U.S.C. 1337.

IV

That the plaintiff Florida Lime and Avocado Growers, Inc.'s complaint fails to state a claim against these answering defendants upon which relief can be granted.

V

That should this Honorable Court retain jurisdiction it should hold the case as to said plaintiff in abeyance pending an authoritative interpretation of the challenged California statutes and regulations by the California courts.

Defendants' motion to dismiss is based on the pleadings, papers and documents on file with the Court, the affidavits filed herewith, the transcript of Deposition of Fred Piowaty, and the points and authorities stated herein, and the answers to written interrogatories which have been served upon a principal officer of the plaintiff corporation, when said answers have been filed with this Honorable Court.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 63] POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Jurisdiction and Status of Case

Plaintiff Florida Lime and Avocado Growers, Inc. is a Florida corporation engaged in the business of marketing avocados and other agricultural products grown in Florida.

(Plfs. Complaint, Par. I; Deposition of Prowaty, Tr. 249.) By its complaint filed in the District Court of the United States for the Northern District of California, Northern Division, on November 13, 1957, this plaintiff seeks an injunction to restrain the enforcement of section 792, Agricultural Code of California. The complaint names as defendants Goodwin J. Knight, Governor, Edmund G. Brown, Attorney General, and W. C. Jacobsen, Director of Agriculture, of the State of California.

Plaintiff invokes the jurisdiction of the court under 28 U.S.C. sections 1331 and 1337 and also prays that the case be heard and determined by a three-judge court as provided by 28 U.S.C. sections 2281 and 2284.

In its complaint the plaintiff Florida Lime and Avocado Growers, Inc., attacks the constitutionality of section 792 of the Agricultural Code of California.[1] Plaintiff centers its constitutional attack on the part of section 792 which provides:

> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8% of oil, by weight of the avocado excluding the skin and seed."

The requirement that avocados contain not less 8% oil was first enacted as part of the Agricultural Code of California in 1925. (Ch. 350, Calif. Stats. 1925.)

Plaintiff asserts that the enforcement of section 792 of [fol. 64] the Agricultural Code, when applied to prohibit delivery and sale in California of avocados grown in Florida and shipped in interstate commerce, offends the Commerce Clause (Article 1, section 8, clause 3) and the Equal Protection Clause (Fourteenth Amendment, section 1) of the Constitution of the United States. (Plfs. Complaint, Pars. XXIX, XXX.)

Statement

Plaintiff Florida Lime and Avocado Growers, Inc. was organized in 1937. (*Id.*, Par. I.) It is engaged in the busi-

[1] Copies of California statutes and administrative regulations cited herein are attached hereto as Exhibit "B."

ness of marketing avocados and other agricultural products grown in Florida. (*Ibid.*; Deposition of Piowaty, Tr. 249.) Between 1937 and 1954 plaintiff did not market avocados in California. (Deposition of Piowaty, Tr. 260.) It commenced marketing Florida avocados in California in 1954. (*Ibid.*)

In each of the crop years since 1954-1955, this plaintiff corporation has picked, packed, and distributed approximately 60,000 bushels of avocados of average value (FOB Florida) of about $275,000.00. (Plfs. Complaint, Par. XIV.) Its avocado sales in California for the past three seasons (1955-56, 1956-57, and 1957-58) have represented an average of only 13.53% of its total avocado sales. (Plfs. Ex. 20.) Moreover, the marketing of avocados is only one phase of plaintiff's business operations, apparently not even a major phase. (Deposition of Piowaty, Tr. 249; Objections to Defendants' Interrogatories Propounded to Harold E. Kendall and Fred Piowaty, filed with the Court, p. 3.)

Only a small fraction of Florida avocados shipped to California fail to comply with California's standardization laws. (Affidavit of S. R. Whipple, Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agriculture, Exhibit "A" hereto.) The percentage of all Florida avocados so failing to comply during the past four market seasons is as follows:

[fol. 65]

Marketing Season	*Total Quantity Shipped into California, in Flats*	*Percentage Failing to Comply*
Oct. 1, 1954-Sept. 30, 1955	58,500	1.01%
Oct. 1, 1955-Sept. 30, 1956	62,400	16.4%
Oct. 1, 1956-Sept. 30, 1957	83,200	2.4%
Oct. 1, 1957-Dec. 31, 1957	26,000	5.9%
	Total Average	6.4%

(*Ibid.*)

Upon arrival of a lot of Florida avocados at a terminal market in California, the avocados are inspected by County Agricultural Commissioner inspectors for defects such as insect damage, freezing injury, decay, and rancidity and for oil content (secs. 782, 792, Calif. Agr. Code; secs. 1397, 1397.1, 1397.5, 1397.6, Title 3, Calif. Adm. Code). When the lot of avocados is found not to comply with state standards, the owner or person in possession may recondition the lot by removing the noncomplying fruit (sec. 785, Calif. Agr. Code). If the owner or person in possession prefers, he may obtain a release of the lot in order that he may market the avocados without the state (secs. 785, 830.1, Calif. Agr. Code; 3 Calif. Admin. Code 1366.2; Plfs. Complaint, Par. XXVI). Mere possession of a lot of avocados which fail to comply with the standards of quality imposed by the California Agricultural Code does not constitute a violation of law (17 Ops. Cal. Atty. Gen. 154, April 20, 1951; secs. 784-785, Calif. Agr. Code). Thus plaintiff exposes itself to no criminal or civil liability by virtue of shipping Florida avocados into the State of California, even though such avocados do not comply with state law.

If the owner or person in possession, after receiving written notice of the noncompliance of the lot of avocados, [fol. 66] chooses neither to recondition nor to dispose of the lot outside the state, the inspecting official files a petition in a California court requesting a court order that the noncomplying lot be abated as a nuisance (sec. 785, Calif. Agr. Code). The court may in its discretion order the lot released, or that it be reconditioned, or that it be disposed of under conditions imposed by the court (sec. 785, Calif. Agr. Code). The owner or person in possession may also file a petition requesting a summary court order that the lot be released to him (sec. 785, Calif. Agr. Code). Only if the owner or person in possession of the noncomplying avocados attempts to sell them to a retailer without inspection, or sells them after receiving notice of the noncompliance and without reconditioning the lot, would a violation occur. Enforcement action by the State could take the form of either a civil action for penalties equaling the value of the fruit, or for misdemeanor criminal

action for fine not exceeding $500.00, or six months' imprisonment. (Secs. 784, 785, 785.6, 831, Calif. Agr. Code.)

Plaintiff Florida Lime and Avocado Growers, Inc., has not taken advantage of the opportunity to recondition lots of noncomplying avocados. (Plfs. Complaint, Par. XXIV.) Nor is there any evidence that this plaintiff corporation has sold a noncomplying lot in California. Rather, this plaintiff has followed the practice of shipping lots that fail to pass California's oil content inspection to neighboring markets outside California, thereby avoiding any violation of California law. (*Ibid.*; Deposition of Piowaty, Tr. 268-269.)

Plaintiff Florida Lime and Avocado Growers, Inc. alleges that it is suffering "great economic detriment and irreparable loss" as a result of the California statute. (Plfs. Complaint, Par. XXXI.) Plaintiff measures this alleged damage by the reduction in anticipated gross return on noncomplying lots reshipped to markets outside Cali- [fol. 67] fornia. (Plfs. Complaint, Par. XXVI.) Thus plaintiff Florida Lime and Avocado Growers, Inc. alleges that it made the following shipments in 1955 which were found not to comply with California law and which were sold outside California:

Date	*Number of Lugs Rejected*	*Expected Gross Return on Entire Shipment*	*Net Yield on Entire Shipment*
11/10/55	1429	$2,088.65	$ 711.60
11/12/55	2083	$3,853.55	$1,681.03
11/14/55	2208	$4,084.80	$1,788.20
12/ 8/55	900	$2,290.00	$ 548.00

(*Ibid.*)

On deposition, Mr. Fred Piowaty, Sales Manager of plaintiff Florida Lime and Avocado Growers, Inc., was able to identify only one other shipment which was found not to comply with California law since this plaintiff commenced shipping avocados to California in 1954. (Deposition of

Piowaty, Tr. 255; Plfs. Ex. 21.)* This single additional shipment, of which 361 lugs were found not to comply, was made in November, 1957 and apparently was sold outside California at no loss in anticipated gross return. (Deposition of Piowaty, Tr. 258; Plfs. Ex. 21.)

These five rejected lots, totaling 6,681 lugs of avocados, represent only 5.47% of all the avocados shipped to California by plaintiff during the corresponding period from October 1954 to December 1957. (See Defendants' Exhibit [fol. 68] "S" showing that plaintiff shipped a total of 122,078 lugs of avocados to California during the seasons 1954-55, 1955-56, 1956-57 and 1957-58.) Moreover, as noted above (see p. 5 *supra*), shipments to California represent only 13.53% of plaintiff's total avocado sales. This means that the 6,681 lugs rejected represent only .74%—less than 1%—of plaintiff's total avocado sales during the period in question. And avocados are only one phase, apparently not even a major phase, of plaintiff's business. (See p. 5 *supra*.)

ARGUMENT

I. The Action Should Be Dismissed for Lack of Equity in the Bill.

A. A Federal Court of Equity Will Interfere with the Enforcement of State Laws Only in Exceptional Circumstances Where There is a Threat of Great and Immediate Irreparable Injury.

This is an equitable action to enjoin state officials from enforcing a state criminal statute.

It is elementary that the power of a court of equity to act is a discretionary one. *American Federation of Labor*

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* Although Mr. Piowaty had a record of only five shipments which were found not to comply, he estimated that plaintiff Florida Lime and Avocado Growers, Inc. had experienced a reduction in anticipated gross return in the amount of $21,000 as a result of selling noncomplying lots outside California between 1954 and January, 1958. (Deposition of Piowaty, Tr. 274-275.)

v. *Watson*, 327 U.S. 582, 593; *Pennsylvania* v. *Williams*, 294 U.S. 176, 185. Even though a court of equity has authority to hear and decide a case on the merits, it should not invoke its jurisdictional powers unless plaintiff has a cause of action in equity. *American Federation of Labor* v. *Watson*, 327 U.S. at 593; *Douglas* v. *Jeannette*, 319 U.S. 157, 162.

Plaintiff, in praying for an injunction restraining defendants as state officers from enforcing laws of California, is seeking a remedy that a federal court of equity will grant only in "exceptional circumstances." *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95. There is a well recognized [fol. 69] general policy of the federal courts against interfering with a state's enforcement of its own laws, even though unconstitutional. *American Federation of Labor* v. *Watson*, *supra*; *Douglas* v. *Jeannette*, *supra*; *Watson* v. *Buck*, 313 U.S. 387; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Spielman Motor Co.* v. *Dodge*, *supra*. Federal courts are especially reluctant to interfere with the enforcement of state criminal laws. *Douglas* v. *Jeannette*, 319 U.S. at 163; *Spielman Motor Co.* v. *Dodge*, 295 U.S. at 95.

A plaintiff asking a federal court of equity to disturb the delicate balance of our federal-state relations by restraining state officers from the performance of their official acts must pass a "strict test" (*American Federation of Labor* v. *Watson*, 327 U.S. at 593); he must show that interference by the federal chancellor is necessary to prevent "irreparable injury" both "great and immediate." *Spielman Motor Co.* v. *Dodge*, 295 U.S. at 95. Otherwise, plaintiff should first raise his constitutional issues in the state courts. *Ibid.*

This policy of caution on the part of federal courts of equity was stated by Mr. Justice McReynolds in *Fenner* v. *Boykin*, 271 U.S. 240, 243-244:

> "Ex parte Young, 209 U.S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances

where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state and must decide when and how this is to be done. [fol. 70] The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500."

The same rule was articulated more recently by Mr. Chief Justice Stone in *Douglas* v. *Jeannette*, 319 U. S. 157, 162-164:

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is [fol. 71] clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if

sought on slight or inconsequential grounds. Di Giovanni v. Camden F. Ins. Asso., 296 U.S. 73, Matthews v. Rodgers, 284 U.S. 521, 525, 526, cf. United States ex rel. Kennedy v. Tyler, 269 U.S. 13, Massachusetts State Grange v. Benton, 272 U.S. 525."

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Davis & F. Mfg. Co. v. Los Angeles, 189 U.S. 207, Fenner v. Boykin, 271 U.S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95, and cases cited; Beal v. Missouri P. R. Corp., 312 U.S. 45, 49, and cases cited; Watson v. Buck, 313 U.S. 387; Williams v. Miller, 317 U.S. 599."

[fol. 72] And Mr. Justice Cardozo stated the policy in this way:

"Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal

courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. [Cases cited.]" *Hawks* v. *Hamill*, 288 U. S. 52, 61.

B. Plaintiff Has Failed to Meet the "Strict Test" of Great and Immediate Irreparable Injury.

It is readily apparent that there are not the exceptional circumstances in this case which would justify an exercise of this court's powers of equity. Plaintiff Florida Lime and Avocado Growers, Inc., is not facing a danger of irreparable harm both great and immediate from the enforcement of California's 8% oil content law.

This plaintiff corporation conducts a substantial business marketing several agricultural products other than avocados. (See p. 5, *supra*.) The marketing of avocados apparently is not even a major phase of this plaintiff's business. (See p. 5, *supra*.) Further, plaintiff's avocado sales in California represent on the average only 13.53% of its total avocado sales. (See p. 5 *supra*.) The California statute is not preventing plaintiff from carrying on even this minor fraction of its total business represented by avocado sales in the remote California market. The five [fol. 73] rejected shipments plaintiff complains of represent only 5.47% of plaintiff's total shipments to California and .74% of all avocados handled by plaintiff during the period in question. (See p. 8 and 9, *supra*.) Moreover, plaintiff has not attempted to recondition these lots so that they could be sold in California. (See p. 7, *supra*.)

Even if the California avocado market were totally unavailable to plaintiff, it does not appear that plaintiff's business would be seriously threatened. Plaintiff attempted no California sales for the first 17 years of its existence, yet apparently grew and prospered. (See p. 5, *supra*.) There is no allegation that the entire crop of Florida avocados cannot be adequately marketed in the remaining 47 states. Cf. *Alabama* v. *Arizona*, 291 U.S. 286, 292. Indeed, since California is the nation's largest producer of avocados (Plfs. Complaint, Par. XV) and is distant from Florida, it is apparent that its importance as a market for plaintiff's avocados is inherently limited.

Thus we have this picture, when stated most favorably to plaintiff: As to one of its many products in one of its many markets it is inconvenienced but not prevented from doing business. This falls far short of irreparable injury both great and immediate. It perhaps would be more appropriate to characterize any such damages as "slight" and "inconsequential." *Douglas* v. *Jeannette*, 319 U.S., at 163.

Plaintiff is certainly suffering no greater inconvenience than the plaintiff in *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89. There the plaintiff was seeking to enjoin enforcement of a state-adopted code of unfair competition regulating plaintiff's business practices as a retail dealer in automobiles. The Supreme Court held that the bill should have been dismissed for failure to state a case within the equitable jurisdiction of the District Court. The Court found an absence of a danger of irreparable harm both great and immediate such as would constitute the exceptional [fol. 74] circumstances which would justify an interference with the enforcement of state laws. Mr. Chief Justice Hughes, writing the opinion for a unanimous Court, stressed that plaintiff had a large business which could be continued under the statute without prohibition or serious interference. He sated:

> "The bill alleged that appellant had a large business in buying and selling motor vehicles but the statute did not prohibit the continuance of that business and the bill gave no facts to show that the particular requirements of the Code, which were in question, would create such a serious interference as to require equitable relief." *Id.* at 96.

Plaintiff seeks to enjoin enforcement of a state statute. Yet it is questionable whether plaintiff Florida Lime and Avocado Growers, Inc. has suffered any damages whatsoever from the enforcement or a threat of enforcement of the 8% oil content statute. The statute has not been enforced against the plaintiff, and, significantly, plaintiff has not alleged that defendants have threatened enforcement. This is understandable since plaintiff has not, evidently,

sold any noncomplying avocados in California. Rather it has, voluntarily and without any court or administrative order, reshipped the noncomplying lots to markets outside California. If there was a reduction in plaintiff's gross return, it was a result of plaintiff's voluntary compliance with the law, rather than enforcement or threat of enforcement of the law. Any damage could not, therefore, be the result of any such enforcement or threatened enforcement. Defendants of course stand ready to perform their duties, but

> "A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity." *Watson* v. *Buck*, 313 U.S. 387, 400.

[fol. 75] C. Plaintiff Should First Attack the Statute in the State Courts or by State Administrative Action.

In the complete absence of "exceptional circumstances" which would warrant equitable interference with state law enforcement, plaintiff

> "should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Fenner* v. *Boykin*, 271 U.S. 240, 244.

There would, of course, be opportunity for review of the federal issues by the United States Supreme Court. *Douglas* v. *Jeannette*, 319 U.S. 157, 167; *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95-96.

Plaintiff has had, for many years and yet today, ample opportunities in the California courts to challenge the validity of the 8% oil content statute by an action for declaratory relief (sec. 1060, Calif. Code. Civ. Proc.) or by petitioning for an order to show cause why a particular seized lot should not be released (sec. 785, Calif. Agr. Code). Plaintiff could expose itself to a nuisance action, a civil action for penalties, or a misdemeanor prosecution (secs. 784, 785, 785.6, 831, Calif. Agr. Code) simply by

selling in California a single shipment of Florida avocados which have failed to comply with the 8% standard. In any such action plaintiff could challenge the constitutional validity of the statute by way of defense. *Douglas* v. *Jeannette, supra; Spielman Motor Co.* v. *Dodge, supra.*

Plaintiff could proceed in the state courts without any disruption of its normal business routine. By selling one noncomplying lot in California, plaintiff would subject itself to a single enforcement action, thereby avoiding the danger [fol. 76] of multiplicity of prosecutions. Cf. *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Spielman Motor Co.* v. *Dodge*, 295 U.S. 85.

Apparently plaintiff feels that it has a right to protection from a federal court of equity from even a single criminal prosecution in the state courts. But the contrary is true:

> "No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

In addition to judicial remedies, plaintiff may have available an administrative remedy under state law. Plaintiff's alleged difficulties with meeting the California standard could be alleviated or entirely removed through action of the state Director of Agriculture in establishing emergency standards which supplement or supersede section 792 of the California Agricultural Code. The Director is authorized to promulgate such emergency standards by section 790.5 of the same Code. A remedy before a state administrative agency must be exhausted before resort may be had to the federal courts. *First National Bank* v. *Board of Commissioners*, 264 U.S. 450, 454.

D. A Further Reason for Dismissing the Action Is the Presence of Unsettled Issues of State Law Which Could Moot the Constitutional Issues.

A further reason why this federal court of equity should dismiss the bill and leave plaintiff to the state courts is the presence of antecedent state law issues which should be resolved by the state courts before the constitutional issues [fol. 77] are decided. *Douglas* v. *Jeannette*, 319 U.S. 157; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Gregg* v. *Winchester*, 173 F.2d 512, *certiorari denied*, 338 U.S. 847; *Bradford* v. *Hurt*, 84 F.2d 722. In *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596, the Supreme Court explained why federal courts of equity should avoid deciding constitutional issues which may become academic upon the resolution of issues of state law.

> "As we have said, the District Court passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution, which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

There are at least three issues of state law which plaintiff could and should present to the state courts. (See p. 22, *infra*.) The resolution of any one of these issues in plaintiff's favor would moot the constitutional issues.

E. Conclusion: The Bill Should Be Dismissed for Lack of Equity.

The final evidence of the lack of equity in the bill is that the plaintiff has conducted its business for many years in the face of California's 8% oil content law without feeling [fol. 78] the need to seek relief from a federal court of equity. The statute was enacted in 1925. (See p. 4, *supra.*) Plaintiff began its business operations in 1937. (See p. 5, *supra.*) Not until 1954 did plaintiff begin marketing avocados in California. (See p. 5, *supra.*) And not until November 1957 did plaintiff seek relief from this federal court of equity. Any delay that might be occasioned by litigating the issues in the state courts would be insignificant when compared with the delay resulting from plaintiff's own inaction. The bill should be dismissed for lack of equity.

II. Plaintiff's Complaint Fails to Show That the Matter in Controversy Exceeds the Sum or Value of $3,000 Within the Purview of 28 U.S.C. 1331.

Plaintiff Florida Lime and Avocado Growers, Inc. asserts that its action is within the jurisdiction of the Court by virtue of 28 U.S.C. 1331 in that it arises under the commerce clause of Article 1, Section 8, and the equal protection clause of the United States Constitution, and that as to each plaintiff, the matter in controversy exceeds the value of $3,000.00 (Plfs. Complaint, Par. III). In determining whether the requisite jurisdictional amount is in controversy, where it does not appear that the plaintiff is absolutely prevented by state law from conducting its business, the decisive question is not the value or net worth of the business but the value of the right to be free from regulation (*Kroger Grocery Co.* v. *Lutz,* 299 U.S. 300). Paragraph XXX, plaintiff's complaint, alleges that the California statute in question limits the California market for the avocados marketed by the plaintiff "at great economic detriment and irreparable loss" (Plfs. Complaint, p. 15, ll. 4-5). However, the complaint fails to state facts sufficient to warrant such legal conclusions. For example, paragraph [fol. 79] XXVI, plaintiff's complaint alleges that the Florida Lime and Avocado Growers, Inc. made shipments in 1955 which were found not to comply with California law and

which were sold outside of California, not apparently at any out-of-pocket loss to plaintiff, but merely at a reduction in anticipated gross returns. (See p. 8, *supra*.)

This reduction in anticipated gross returns during the year 1955 avail the plaintiff nothing for purposes of meeting the requirements of 28 U.S.C. 1331 because "past losses cannot be used to build up the jurisdictional requirement in an action for an injunction to restrain enforcement of the [state] statute. *Dunning* v. *Agricultural Prorate Advisory Comm.*, 38 F. Supp. 393, 394 (District Court N.D., California, S.D.). It appears doubtful whether plaintiff Florida Lime and Avocado Growers, Inc. had any connection with these 1955 shipments which were made by its predecessor 1937 cooperative which was reorganized as a corporation for profit in 1956, a year after these shipments were made (Plfs. Complaint, Par. I). It follows that the plaintiff Florida Lime and Avocado Growers, Inc. has not alleged any facts in its complaint showing that the right to be free of regulation by section 792, California Agricultural Code, is of the value of $3,000 within the jurisdictional prerequisites of 28 U.S.C. 1331.

III. Plaintiff's Complaint Fails to Show That the Action or Proceeding Arises Under Any Act of Congress Regulating Commerce Within the Purview of 28 U.S.C. 1337.

Plaintiff's complaint alleges that section 792, California Agricultural Code, is unconstitutional when applied to avocados delivered for sale in interstate commerce in compliance with standards established by the Secretary of Agriculture, pursuant to the Federal Marketing Agreement Act of 1937 (Plfs. Complaint, Par. XXX). However an analysis of the federal act discloses that it authorizes cooperative federal-state action in the field of agricultural [fol. 80] marketing (7 U.S.C. 610(i)). Thus federal marketing orders may cover the same geographic area as a state regulation covering the same area and commodity without causing preemption of the field as a matter of law.

Federal Marketing Orders	*State Marketing Orders*
Marketing Order Governing Dried Figs Produced in California, 7 C.F.R. 964	Marketing Order for Dried Figs, issued effective July 22, 1953
Marketing Order Governing Beurre d'Anjou, Beurre Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau Varieties of Pears Grown in Oregon, Washington, and California, 7 C.F.R. 939	Marketing Order for Fresh Fall and Winter Pears Grown in California, issued effective August 26, 1951
	Marketing Order for Fresh Bartlett Pears, issued effective August 9, 1939.

In the instant case, however, there is not even geographic overlapping of federal and state legislative action since the federal marketing order governing avocados grown in South Florida is applicable only to "the handling of avocados grown in the designated production area" of "the counties of Brevard, Osceola, Polk, Hillsborough, and Pinellas in the State of Florida, and all of the counties of that state situated south of such counties" (Plfs. Complaint, Ex. A; 7 C.F.R. 969(3), 969.4). This marketing order further provides that "The said order is limited in its application to the smallest regional production area that is practicable . . . " (Plfs. Complaint, Ex. A; 7 C.F.R. 969(3)). Under these circumstances, defendants respectfully submit that the Federal Marketing Agreement Act of 1937 does not invalidate state action in the field of agricultural mar- [fol. 81] keting, and that as a matter of law the Secretary of Agriculture did not intend to preempt the field of avocado marketing regulation in promulgating the federal Florida Avocado Marketing Order. *Parker* v. *Brown*, 317 U.S. 341, 358; cf. *Townsend* v. *Yeomans*, 301 U.S. 441, *Reed* v. *Colorado*, 187 U. S. 137. It follows that plaintiff's allegations of conflict between the state and federal regulation of avocados stands as a mere colorable allegation which fails to comply with the requirements of 27 U.S.C.A. 1337. *Levering Co.* v. *Morrin*, 289 U.S. 103, 105; *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 361.

IV. Alternatively, This Honorable Court Should Hold the Case in Abeyance Pending an Authoritative Interpretation of California Law by California Courts.

Federal courts of equity in the exercise of a sound discretion should avoid passing on substantial constitutional issues concerning the meaning of California statutes and regulations which have never been construed by the California courts, *American Federation of Labor* v. *Watson*, 327 U.S. 582. When authoritatively construed, section 792, California Agricultural Code, may or may not have the meaning or force which plaintiff assumes that it has. In the absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What this Honorable District Court might decide on federal constitutional issues might hereafter turn out to be an academic and needless dissertation. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596.

There are present in this case issues of interpretation of California law which plaintiffs should raise before the Director of Agriculture, and in the California courts.

Plaintiff's complaint alleges that the matter in controversy is the right of plaintiff to market Florida avocados in California free from restriction of section 792, Agricul-
[fol. 82] tural Code (Plfs. Complaint, Par. III). This allegation raises the antecedent issue of state law whether this statute was intended by the California legislature to apply to avocados moving into California while in interstate commerce, or whether it was to apply only to sales of avocados in intrastate commerce. Cf. *Bourjois* v. *Chapman*, 301 U.S. 183. So far as defendants can ascertain, there are no California judicial decisions construing the reach of this statute. This question of statutory interpretation, which could moot the constitutional issues, can be determined with finality only by the California courts (*American Federation of Labor* v. *Watson*, 327 U.S. 582).

Plaintiff's complaint suggests another issue of state law which could be submitted to the California courts. This is the issue whether California's avocado standardization law was intended by the state legislature to apply to avocados grown in another state and marketed pursuant to a Federal Marketing Order promulgated under the Agricultural Marketing Act of 1937.

Still a third issue of state law which plaintiff should present to the California courts is the validity under the California statute (sec. 782, Calif. Agr. Code) of the implementing regulation establishing the official method of securing samples from lots of avocados and the method of chemical analysis of oil content. (3 Calif. Adm. Code sections 1397.5, 1397.6.) Cf. *Railroad Comm'n. of Texas* v. *Pullman Co.*, 312 U.S. 496.

Defendants would endeavor in the state court to establish the validity of these regulations and statutes under state law and their applicability to plaintiff's avocados shipped from Florida. But defendants recognize that other possible interpretations exist and that plaintiff can and should present these questions to a state court before asking a federal court of equity to rule on speculatory federal constitutional questions. If plaintiff was successful in establishing its case in the state courts on these issues there [fol. 83] would be no need for this Honorable Court to rule on the posed federal questions.

In light of these uncertain issues of state law, this Honorable Court should, if it does not dismiss the action, remit the parties to the California courts for resolution of the state law questions. *American Federation of Labor* v. *Watson*, 327 U.S. 582, *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, *East Coast Lumber Co.* v. *Babylon*, 174 F. 2d 106.

Wherefore, defendants respectfully pray that the complaint of the plaintiff, Florida Lime and Avocado Growers, Inc. be dismissed or alternatively that the action be stayed pending the resolution of issues of state law by the California courts.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General,

By John Fourt, Attorneys for Defendants.

[fol. 84]

EXHIBIT "A" TO MOTION

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

AFFIDAVIT OF S. R. WHIPPLE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Comes now S. R. WHIPPLE and deposes and says:

That he is Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agriculture; that he has held said position since August, 1945; that in such position he is charged with the duty of supervising the inspection work performed by inspectors of the Bureau of Fruit and Vegetable Standardization and the California County Agricultural Commissioners and their staffs in the inspection of avocados found in California [fol. 85] wholesale terminal markets in the enforcement of section 792 of the California Agricultural Code, which requires that avocados offered for sale, among other things, also must meet a minimum oil content requirement of eight per cent (8%).

That official records maintained by the federal-state market news service, California Department of Agriculture, show that during the respective marketing seasons the following quantities of avocados were shipped from Florida and unloaded in the California wholesale market terminals at Los Angeles, San Francisco, and Oakland, California:

Marketing Season	*Destination*			*Total Car-loads*	*Total Flats*
	L.A.	*S.F.*	*Oakland*		
Oct. 1, 1954-Sept. 30, 1955	12	13	20	45	58,500
Oct. 1, 1955-Sept. 30, 1956	16	15	17	48	62,400
Oct. 1, 1956-Sept. 30, 1957	26	11	27	64	83,200
Oct. 1, 1957-Dec. 31, 1957	2	2	16	20	26,000

Source: Unload Reports for Los Angeles, San Francisco and Oakland as issued by Federal-State Market News Service. Other markets not reported. Conversions: 1300 flats per carload.

that he is informed and believes and on such information and belief alleges that these quantities account for substantially all of the Florida avocados shipped into California during the period of time from October 1, 1954 through December 31, 1957.

That the official records of the Bureau of Fruit and Vegetable Standardization, California Department of Agriculture, disclose the following rejections of containers of Florida avocados in California because the lots of avocados tested failed to comply with the eight per cent (8%) oil standard set forth in section 792, California Agricultural Code:

[fol. 86]

Marketing Season	*Flats*	*Percent of Total**
Oct. 1, 1954-Sept. 30, 1955	591	1.01%
Oct. 1, 1955-Sept. 30, 1956	10284	16.4%
Oct. 1, 1956-Sept. 30, 1957	1867	2.4%
Oct. 1, 1957-Dec. 31, 1957	1540	5.9%

* Percentage obtained by dividing flats rejected in each season by the flats received for the same period each season.

s/ S. R. Whipple
S. R. Whipple

Subscribed and sworn to
before me this 3d day
of March, 1958.

(SEAL.) s/ Laura M. Middleton
Notary Public in and for the
County of Sacramento,
State of California.

[fol. 87]

EXHIBIT "B" TO MOTION

Copies of California Statutes and Administrative Regulations Cited in These Points and Authorities

Cal. Agr. Code, Sec. 782, provides:

"The director and the commissioners of each county of the State, their deputies and inspectors, under the supervision and control of the director shall enforce this chapter. The refusal of any officer authorized under this chapter to carry out the orders and directions of the director in the enforcement of this chapter is neglect of duty.

The director may prescribe methods of selecting samples of lots or containers of fruits, nuts and vegetables on a basis of size or other specific classification, which shall be reasonably calculated to produce by such sampling fair representations of the entire lots or containers sampled; establish and issue official color charts depicting the color standards and requirements established in this chapter; and make such other rules and regulations as are necessary to secure uniformity in the enforcement of this chapter.

Any sample taken under the provisions of this chapter shall be prima facie evidence, in any court in this State, of the true condition of the entire lot in the examination of which said sample was taken. A written notice of violation, issued by a duly qualified representative of the director or by the commissioners, their deputies and inspectors holding valid standardization certificates of eligibility as enforcing officers of this chapter, stating that a certain lot of produce is in violation of the provisions of this chapter and based upon the examination of such sample, shall be prima facie

evidence, in any court in this State, of the true condition of the entire lot."

[fol. 88] Cal. Agr. Code, Sec. 784, provides:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

Cal. Agr. Code, Sec. 785, provides:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this [fol. 89] section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring

said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of non-[fol. 90] compliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an

order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured as otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner."

Cal. Agr. Code, Sec. 785.6, provides:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly in an action brought by the director, for a [fol. 91] penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

Cal. Agr. Code, Sec. 790.5, provides:

"Whenever, upon petition of persons interested in the growing or handling of fruits, nuts or vegetables, or upon his own motion, the director finds that any provision of this chapter relating to standards for any commodity or type of container, or relating to any markings required on any container, or any arrangement of the produce within a container, is difficult or impossible of performance by reason of laws or orders promulgated by authority of the Government of the United States, or because of scarcity

of materials, labor, or equipment used in the production or marketing of any commodity regulated by this chapter, or that any such provision of this chapter results in serious waste of useful produce otherwise available for human consumption or in serious waste of other resources, or prevents utilization of new technological developments, to the serious disadvantage of California producers, he may establish emergency standards for any such commodity or container, or for the marking of containers, or for the arrangement of produce within the container; and until expiration as hereinafter provided, such emergency standards shall be in full force and effect, notwithstanding any other provision of this chapter, and all provisions of this chapter applying to standards shall apply to such emergency stand-
[fol. 92] ards in lieu of the standards set forth in this chapter.

All emergency standards established under the provisions of this section shall be reasonably calculated to effectuate the purposes of the standards which they supersede. No emergency standards shall be established which tend to raise or lower any standards relating to the maturity or to the carrying or keeping quality of any commodity, and no emergency standards shall be construed to modify in any respect any provision of this chapter designed to prevent deception or mislabeling, or designed to prevent the marketing of produce which is unwholesome or which would fail to give consumer satisfaction.

All emergency standards issued under the provisions of this section, before they may become effective, shall be published in one or more newspapers, trade papers, or industry publications deemed best adapted to give notice to interested persons, together with a notice of the time and place for hearing objections. Such hearing shall be not less than 10 nor more than 20 days from the date of publication. Notice of hearing shall be mailed not less than 10 days prior to the date of the hearing to all persons who theretofore have filed with the director a request for notice of such hearings. If at the hearing it shall be developed by competent testimony that additional time will be required to produce further essential evidence the director shall continue the hearing to a date which will allow sufficient time

for the production of such evidence. At the hearing, interested parties shall be heard and a record kept of the proceedings for determination by the director of the facts shown at the hearing. The director, upon his findings on the facts shown at the hearing, shall rescind, modify or affirm the emergency standards as published; and such [fol. 93] emergency standards shall take effect on the day appointed therefor, and shall continue in effect until suspended or rescinded by the director, or until the ninety-first day after adjournment of the next regular session of the Legislature, whichever first occurs.

Emergency standards may be amended, suspended, or rescinded upon notice and hearing in the same manner as provided for the establishment of such standards."

Cal. Agr. Code, Sec. 792, provides:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

Cal. Agr. Code, Sec. 830.1, provides:

"The enforcing officer may, and when requested by an enforcing officer of the county of destination shall, affix a warning notice to any vehicle or other means of transportation, or to any load or lot, of fruits, nuts, or vegetables which do not conform to the standards established by this chapter, whether or not exempt from such standards, and serve a disposal order upon the owner or person having custody or possession of any such load or lot.

The warning notice, the disposal order directing the [fol. 94] proper disposition of such products, and the dis-

posal order receipt to be signed by an enforcing officer at destination confirming such disposition shall be in the form specified by and provided by the director.

The enforcing officer at the point of destination of such load or lot shall determine that the load or lot has been delivered to the consignee at the destination specified in the order and shall thereupon release the load or lot and countersign the disposal order receipt so given to him. He shall immediately forward the receipt to the enforcing officer who served the disposal order."

Cal. Agr. Code, Sec. 831, provides:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

[fol. 95] Cal. Adm. Code, Title 3, Sec. 1366.2, provides:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed

under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or remarked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

[fol. 96] Cal. Adm. Code, Title 3, Sec. 1397, provides:

"*Avocados, Freezing Injury.* Discoloration due to freezing shall be considered to be a defect causing a waste of 10 percent or more, by weight, of the entire avocado, including skin and seed if:

(a) A brown color is apparent on any amount of the outside surface of the skin, and there is a discolored ring or layer of flesh adjacent to the skin, which has a water-soaked appearance, and this ring or layer extends over an area equal to 10 percent or more of the surface of the avocado; or

(b) Abnormal and distinct discoloration or desiccation of the flesh occurs on a transverse cut made through the blossom end of the fruit at the base of the seed, or through the neck of the fruit at a point at least one inch from the stem end, or on either such cut surface if it covers an aggregate area of (1) not less than 5/16 of an inch in diameter when applied to an avocado weighing 5 ounces or less, including skin and seed, or (2) not less than ½ of an inch in diameter when applied to an avocado weighing more than 5 but less than 10 ounces, including skin and seed, or (3) not less than ¾ of an inch in diameter when applied to an avocado weighing 10 ounces or more, including skin and seed; or

(c) Fifteen or more bundles of fibres (spots) which are black appear on either surface of a transverse cut made through the fruit at a point ½ the distance between the stem end and the distal end of the fruit. (Rev. 5/57)"

Cal. Adm. Code, Title 3, Sec. 1397.1, provides:

"*Avocados, Number of Avocados to Select to Inspect for Frost Damage.* The number of containers of avocados from which fruit is to be sampled is provided in Section 1367, [fol. 97] California Administrative Code. The following is in addition to the above-named section:

(a) When it is evident from the outside appearance of the avocados in the lot that freezing damage has occurred to the avocados, a random sample is not necessary.

(b) When freezing damage is not evident from the outside appearance of the avocados in a lot, the following method shall be used:

(1) When 5 containers or less are selected, inspect 10 avocados which have been selected at random from all containers in the sample. If 1 of these fruits is considered rejectable under Section 792 of the Agricultural Code, and Section 1397 of the Administrative Code, inspect an additional 10 avocados selected from the same containers in the same manner. When more than 5 percent, by count, of these 20 fruits are considered rejectable, the lot shall be considered in violation.

(2) When 6 or more containers are selected, inspect 20 avocados which have been selected at random from all containers in the sample. When more than 5 percent, by count, of these 20 fruits are considered rejectable, the lot shall be considered in violation.

(3) When avocados have been sized, each size must be tested as a separate lot; when not sized, test large, medium and small fruits as separate lots.

(c) When avocados have been selected under method (a), the fruit, or the results of testing them, shall not be combined in any way with those selected to be tested under method (b). (Rev. 5/57)"

Cal. Adm. Code, Title 3, Sec. 1397.5, provides:

"*Avocados, Determination of Oil Content.* The method of [fol. 98] determining oil content in avocados shall be the

method as described in the 'Official Method for the Determination of Oil in Avocados', issued by the Bureau of Chemistry of the State Department of Agriculture, and published in the 1st quarterly, 1955 Bulletin of the State of California, Department of Agriculture, Volume XLIV, Number 1."

Cal. Adm. Code, Title 3, Sec. 1397.6, provides:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpose of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said [fol. 99] low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better. (Rev. 5/57)"

[fol. 100] EXHIBIT TO MOTION

(See Opposite) ☞

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OFFICIAL METHOD FOR THE DETERMINATION OF OIL IN AVOCADOS

(Revised 1954)

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Bureau of Chemistry, California Department of Agriculture

Section 792 of the Agricultural Code of the State of California provides, in part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." The maturity of an avocado is of considerable importance; an avocado of insufficient maturity is likely to shrivel and rot while softening and will lack the desirable flavor found in more mature fruit. Appraising the maturity of an avocado by visual inspection is of some importance but even expert judgment fails in many instances. Factors considered in such inspection are general ground color, number and nature of surface spots, conditions of stem, and when cut the thickness and color of seed coat and condition of seed. Growing conditions in the orchard at time of picking are of some importance, too.

The primary standard method for measuring the oil in avocados is by ethyl ether extraction from the dried avocado pulp in a Soxhlet extractor. This method is time-consuming and involves direct weighing of the oil. In 1928 Lesley and Christie [1] described a shorter method, calibrated against results obtained by ether extraction, for more rapid determination of the oil content of avocados. This method involves grinding the fresh avocado pulp with Halowax oil (technical monochloronaphthalene) and measuring the refractive index of the avocado oil and the Halowax-oil mixture. The index thus obtained is given meaning by a parallel determination of oil content by actual ether extraction. By obtaining a series of such values and constructing a graph each small change in refractive index could be represented by the proper change in percent oil.

The work of Lesley and Christie [1] was brief and rather incomplete. In 1949 A. F. Shannon [2], after considerable work and research in collaboration with a Bureau of Chemistry Staff member, revised the oil content-refractive index chart published in *The Bulletin* [3] and this appears now as Table 1 in this publication. The method established for ether extraction is also described in the A. F. Shannon paper [2].

APPARATUS AND SOLUTIONS REQUIRED

Portable food chopper with nut butter cutter (fine) blade or Acme Safety Grater

Power grinder, type Figure (1) or type Figure (2)

Grinding Shell with two steel balls
Spatula (small)
Knife, three-inch blade
Pipette, 5 ml. (all glass automatic type may also be used)
Filter paper (soft), drip coffee maker type
Halowax oil No. 1000, Fisher Scientific Company or equivalent
Ethyl ether
Tweezers
Abbe type refractometer and attachments (water circulated)
Lens light or suitable instrument light
Large watch glass or pie tin
Balance, sensitive to 10 milligrams, capacity 5 to 100 grams
Small electric heater or hot water bath

Halowax Oil. The index of refraction of different lots of Halowax oil may vary as much as 0.002 and may also change with age or exposure to light. The index of refraction of each lot used should be obtained and corrected to 25 degrees C. as described below under "Calculation—Halowax Oil Correction."

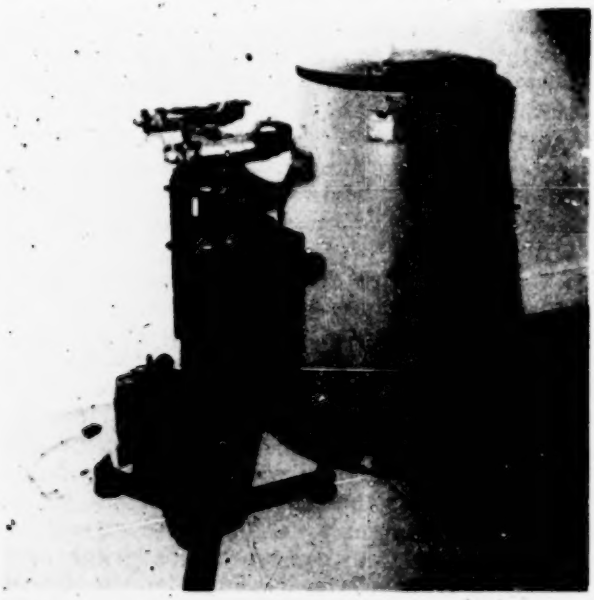

FIGURE 1. Power grinder type 1 removed from drum housing showing grinding shells in position. Operating time 10 minutes per sample. Specifications available from California Department of Agriculture.

Power Grinders. The later type grinder shown in Figure 1 has faster action than grinders formerly used and an operating time of 10 minutes has been found sufficient for the hardest fruits encountered. If the type in Figure 2 is used, 15 minutes operation is recommended.

Grinding Shells. Shell material of monel is preferred; steel balls should be well seated at the ends of cylinder. The cylinder seals must be protected from damage and reground when necessary to form an excellent seal. The steel balls should be one-eighth inch less in diameter than the shell cylinder. Complete specifications for construction of grinding shell may be obtained from California Department of Agriculture.

FIGURE 2. Power grinder type 2 showing one grinding shell in position. Operating time 15 minutes per sample. Specifications available from California Department of Agriculture.

PREPARATION OF SAMPLE

Sample Preparation Using Portable Food Chopper. Dice to about one-half inch cubes the entire fruit excluding the skin, seed and seed coat. This may be facilitated by first quartering the fruit lengthwise. After thoroughly mixing the cubes, transfer all or a portion (size of fruit determining) of the mass slowly through a clean and dry food chopper. Careful operation will prevent juices from being lost. Collect the pulp on a pie tin or suitable dish. Thoroughly mix the pulp and as rapidly as possible weigh 5 grams to the nearest 10 milligrams on a piece of soft filter paper in a weighing dish. Filter papers used in drip coffee makers are satisfactory. Transfer the weighed sample together with filter paper into the special grinding shell containing one ball bearing. Wipe the weighing dish with a piece of soft filter paper and place this into the shell, followed by the second ball bearing. Pipette exactly 5 ml. of Halowax oil into the shell. Keep shell in vertical position until cap is fastened tightly with wrench to avoid leakage.

Sample Preparation Using Acme Safety Grater. Clean and dry the grater. Cut the avocado lengthwise into homologous (mirror image) halves. A portion of the skin and seed coat on one-half along the larger perimeter, is removed and the cut face pressed and moved in a rotary manner across the grater until a fair amount of the avocado pulp is collected on a pie tin or suitable dish below. Always see that depth of grating is equal from stem to calyx end of half-section. After thoroughly mixing the pulp, weigh 5 grams, transfer to the grinding shell, and add exactly 5 ml. Halowax oil as described in the preceding paragraph.

TREATMENT OF THE FIVE GRAM SAMPLE IN SHELL

Clamp the shell containing the 5 gram sample and 5 ml. Halowax oil into the power grinding machine. Operating periods for the different

types of shaker devices differ but in any case the resulting paste formed in the shell should be a smooth uniform paste. Upon any evidence of incomplete maceration the sample should be discarded. Large chunks in the weighed pulp may often cause this condition.

Transfer the bulk of the mixture by means of a small spatula to a pie tin or large watch glass and squeeze out the liquid by pressing and kneading with the spatula. The separation is facilitated by gently heating for a short period on a hot water bath. Extended heating must be avoided because Halowax oil is appreciably volatile at the temperature of a hot water bath.

Cool the oil mixture and transfer a few drops to the refractometer prism. Avoid touching hard objects to the prism surface. Follow operating instructions for make of instrument used. Refractometer temperature should have been previously stabilized to 25 degrees C. by means of water circulating through the instrument. A constant temperature circulating system is convenient if available.

Read the index of refraction of the Halowax oil mixture to the fourth decimal figure.

CALCULATIONS

Temperature Correction: If the reading is taken at any temperature other than 25 degrees C. a correction must be applied by adding 0.0004 for every full degree above 25 degrees C. or subtracting 0.0004 for every degree below 25 degrees C. Fractions of a degree to the nearest one-fourth should be compensated accordingly.

Halowax Oil Correction: if the index of refraction of Halowax oil used is less than 1.6353 the difference is added to the reading on the sample; if greater the difference is substracted from the refractometer reading. The resulting figure is "corrected refractive index." With use of this corrected reading obtain the percent oil in avocado from the table.

Sample Calculation

Reading obtained on refractometer at 24.5 degrees C. 1.6155
Temperature correction = −0.0002
Reading corrected to 25 degrees C. = 1.6153
Index of refraction of Halowax oil used corrected to 25 degrees C. 1.6348
Standard correction = (1.6353 − 1.6348) = 0.0005 to be added
Final "corrected refractive index" = (1.6153 + 0.0005) = 1.6158

Reference to Table 1 shows this figure corresponds to 12.1 percent oil in the avocado under examination.

CLEANING OF REFRACTOMETER

The prism surfaces of the refractometer should be cleaned after each determination by first wiping gently or blotting with either lens paper, clean cotton or softest facial tissue; then clean with another piece soaked in ether and finally wiping clean with a third piece such that the surface of the measuring prism appears bright.

CHANGE IN REFRACTIVE INDEX OF HALOWAX OIL CAUSED BY THE AVOCADO OIL EXTRACTED

Based on Halowax Oil Nd. 1.6353 at 25 Degrees C.)

Corrected refractive index	*Percent oil*	*Corrected refractive index*	*Percent oil*	*Corrected refractive index*	*Percent oil*
1.6281	4.0	1.6218	8.0	1.6159	12.0
.6280	4.1	.6216	8.1	.6158	12.1
.6278	4.2	.6214	8.2	.6157	12.2
.6277	4.3	.6213	8.3	.6155	12.3
.6275	4.4	.6211	8.4	.6153	12.4
.6273	4.5	.6210	8.5	.6152	12.5
.6272	4.6	.6208	8.6	.6151	12.6
.6270	4.7	.6207	8.7	.6149	12.7
.6269	4.8	.6205	8.8	.6148	12.8
.6267	4.9	.6204	8.9	.6146	12.9
1.6265	5.0	1.6202	9.0	1.6145	13.0
.6264	5.1	.6201	9.1	.6143	13.1
.6262	5.2	.6199	9.2	.6142	13.2
.6260	5.3	.6198	9.3	.6141	13.3
.6259	5.4	.6196	9.4	.6139	13.4
.6257	5.5	.6195	9.5	.6137	13.5
.6255	5.6	.6193	9.6	.6136	13.6
.6254	5.7	.6192	9.7	.6135	13.7
.6252	5.8	.6190	9.8	.6133	13.8
.6250	5.9	.6189	9.9	.6132	13.9
1.6249	6.0	1.6187	10.0	1.6131	14.0
.6247	6.1	.6186	10.1	.6129	14.1
.6245	6.2	.6184	10.2	.6127	14.2
.6244	6.3	.6183	10.3	.6126	14.3
.6243	6.4	.6182	10.4	.6125	14.4
.6241	6.5	.6180	10.5	.6123	14.5
.6239	6.6	.6179	10.6	.6121	14.6
.6237	6.7	.6178	10.7	.6120	14.7
.6236	6.8	.6176	10.8	.6118	14.8
.6234	6.9	.6175	10.9	.6117	14.9
1.6232	7.0	1.6173	11.0	1.6116	15.0
.6231	7.1	.6172	11.1	.6115	15.1
.6229	7.2	.6171	11.2	.6113	15.2
.6228	7.3	.6169	11.3	.6111	15.3
.6226	7.4	.6168	11.4	.6110	15.4
.6225	7.5	.6166	11.5	.6109	15.5
.6223	7.6	.6165	11.6	.6107	15.6
.6222	7.7	.6163	11.7	.6106	15.7
.6220	7.8	.6162	11.8	.6105	15.8
.6219	7.9	.6161	11.9	.6103	15.9

REFERENCES

(1) B. E. Lesley and A. W. Christie, Ind. Eng. Chem. Anal. Ed., Vol. 1, No. 1 (1929) p. 24.

(2) A. F. Shannon, Bulletin, Calif. Dept. of Agriculture, Vol. XXXVIII, No. 3, (1949) p. 127.

(3) Bulletin, Calif. Dept. of Agriculture, Vol. XXXVI, No. 1, (1947) p. 20.

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[fol. 106] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

NOTICE OF MOTION FOR DISMISSAL AS TO SOUTH FLORIDA GROWERS ASSOCIATION, INC. OR ALTERNATIVELY FOR STAY OF PROCEEDINGS—Filed March 14, 1958

To: Plaintiff, South Florida Growers Association, Inc., and To: Isaac E. Ferguson, Esq., Its Attorney:

You, and Each of You, Will Please Take Notice that on Monday, April 7, 1958, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, the defendants above named will move the above-entitled Court for its order dismissing the above-entitled action as to said plaintiff on the following grounds:

I

That plaintiff's complaint fails to allege facts showing a cause of action as to said plaintiff within the equity juris-
[fol. 107] diction of the Federal District Court.

II

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the matter in controversy exceeds the sum or value of $3,000, exclusive of interests and costs within the purview of 28 U.S.C. 1331.

III

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the action or proceeding arises under any Act of Congress regulating commerce within the purview of 28 U.S.C. 1337.

IV

That the plaintiff South Florida Growers Association, Inc.'s complaint fails to state a claim against these answering defendants upon which relief can be granted.

V

That should this Honorable Court retain jurisdiction it should hold the case as to said plaintiff in abeyance pending an authoritative interpretation of the challenged California statutes and regulations by the California courts.

Defendants' motion to dismiss is based on the pleadings, papers and documents on file with the Court, the affidavits filed herewith, the transcript of Deposition of Harold E. Kendall, and the points and authorities stated herein, and the answers to written interrogatories which have been served upon a principal officer of the plaintiff corporation, when said answers have been filed with this Honorable Court.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General. By John Fourt, Attorneys for Defendants.

[fol. 108] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, Inc., a Florida corporation, Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

MEMORANDUM AND ORDER—March 20, 1958

In this case there are presently before the Court two motions. The first is a motion intertwined with a set of objections which deal with certain questions and interrogatories, for all practical purposes identical in nature, propounded by defendants to Harold E. Kendall, President of plaintiff, South Florida Growers Association, Inc., and to Fred Piowaty, Secretary of plaintiff, Florida Lime and [fol. 109] Avocado Growers, Inc. The second is a motion by defendants seeking authority to make certain amendments to plaintiffs' complaint and defendants' answer, and also seeking permission to add a fifth (new) defense to defendants' answer to plaintiffs' complaint on file in the action.

The Questions and Interrogatories

These questions and interrogatories as propounded to each witness are identical in nature and seek certain business data from the plaintiffs. If the questions must be answered, so must the interrogatories be answered. It would appear, however, from a practical standpoint that if the interrogatories are properly answered, there will be no real need for answers to the questions.

The Court has reviewed the arguments of each side relative to these questions and interrogatories. While the reasons for the reluctance of the plaintiffs to give the requested information is understandable, the plaintiffs have instituted this action, and they should not deny the defendants any information which the defendants in good faith believe they need to make a proper defense to the action. It is apparent to the Court that the defendants seek the requested information in good faith and are not on a mere fishing expedition. Whether the information sought will avail defendants anything cannot be determined at this time, but that in itself is not sufficient cause to deny defendants the information they seek.

It follows from what has been said that defendants' motion to require the witnesses to answer the propounded [fol. 110] questions must be granted, and at the same time plaintiffs' objections to defendants' interrogatories must be overruled.

The Amendments

It is the understanding of the Court that the parties are agreed that all amendments to plaintiffs' complaint and defendants' answer, save the adding of the fifth defense to defendants' answer, may be granted. An order will be made accordingly.

As for the fifth defense, it is apparent to the Court that this defense could have been made a part of defendants' answer when it was originally prepared and filed. The Court can see no way in which the plaintiffs' rights will be prejudiced by permitting the filing of this new defense at this time. When these facts are applied to the Court's view that under ordinary circumstances, no case should ever be determined on the pleadings, or lack of pleadings in the case, it follows that the motion for permission to file the fifth defense must be granted.

It Is, Therefore, Ordered that defendants' motion to require the witnesses to answer the propounded questions covered by the motion be, and the same is, hereby granted;

It Is Further Ordered that plaintiffs' objections to defendants' interrogatories be, and the same are, overruled;

And It Is Further Ordered that defendants' motion for permission to amend plaintiffs' complaint and defendants' [fol. 111] answer, including the right to file a fifth (new) defense, be, and the same is, hereby granted.

Dated: March 20, 1958.

Sherrill Halbert, United States District Judge.

[fol. 112] [File endorsement omitted]

In United States District Court for the Northern District of California, Northern Division

[Title omitted]

Amended Answer—Filed March 20, 1958

Come now W. C. Jacobsen, Director of Agriculture, State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney Gen-

eral, State of California, and with leave of court first had and obtained file this their amended answer to plaintiffs' complaint as amended by interlineation, and for their causes of defense allege as follows:

First Defense

That said complaint fails to state a claim against these answering defendants upon which relief can be granted.

[fol. 113]

Second Defense

That the above-entitled court lacks jurisdiction over the subject matter set forth in plaintiffs' said complaint, or at all.

Third Defense

That these answering defendants admit the allegations contained in paragraphs II, V, VI, VIII, IX, X, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' said complaint; that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VII, XII, XIII, XIV, XXII, XXIV(a), XXV and XXVII of plaintiffs" said complaint and on said ground deny the truth of each and every allegation contained in said paragraphs; that these answering defendants deny each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV(b), XXVIII, XXIX, XXX, XXXI, and XXXII of plaintiffs' said complaint; that these answering defendants admit the allegations contained in lines 29 to 32, page 7, and lines 1 to 10, page 8, ending with "February," of paragraph XV of plaintiffs' said complaint, and deny each and every allegation contained in lines 10 to 19, page 8, beginning with "Thus" on line 10, page 8, and ending with "California" on line 19, page 8, of paragraph XV of plaintiffs' said complaint; that these answering defendants deny each and every allegation contained in paragraph XXVI of plaintiffs' said complaint excepting that defendants admit that they have in the past and now stand ready to perform their duties under their oath of office should they acquire knowledge of violations of the Agricultural Code of the State of California.

Fourth Defense

That the federal courts have adopted the salutary policy [fol. 114] of judicial self-restraint in suspending or enjoining enforcement of state statutes alleged to be unconstitutional on the ground that a complainant might be civilly or criminally prosecuted for violation of them, where the state court, which has the last word on the construction and meaning of the statute, has never passed upon the statute attacked. In the absence of a showing that the danger of irreparable loss is both great and immediate, plaintiffs herein should first set up the invalidity of the statute in the state court, even though the validity of the statute is challenged, since there is ample opportunity for ultimate review by the United States Supreme Court of federal questions after decision by the state court.

Fifth Defense

That the quality and maturity standards purportedly promulgated under Marketing Order No. 69, governing avocados grown in South Florida (19 F.R. 3439, 7 C.F.R. 969), the promulgation, and the methods and procedures used in the administration thereof, are unreasonable and arbitrary and are invalid in that they fail to comply with the requirements of the Marketing Agreement Act, of 1937, as amended (7 U.S.C.A 601 et seq.).

Sixth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing of immature, unwholesome avocados; thus maintaining the industry reputation, and consumer and trade market [fol. 115] demand, for mature, wholesome, nutritious avocados.

Wherefore, defendants pray:

1. That the plaintiffs' said complaint be dismissed;

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, delivered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That the defendants be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendants their costs.

Dated: Feb. 26, 1958.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 149] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ANSWERS OF HAROLD E. KENDALL, PRESIDENT OF PLAINTIFF SOUTH FLORIDA GROWERS ASSOCIATION, INC., TO DEFENDANTS' INTERROGATORIES—Filed April 8, 1958

Interrogatory No. 1: What was the net worth of South Florida Growers Association, Inc. as of the close of its last fiscal year, March 31, 1957?

Answer: $18,255.64.

Interrogatory No. 2: What was the net worth of South Florida Growers Association, Inc. as of December 31, 1957?

Answer: No statement of net worth as of December 31, 1957 is available, since no audit was made as of this date. The accountants of the corporation, Bolger & Fisher of Miami, Florida, have advised me that it would be ex-

tremely difficult to make an estimate of net worth as of a date other than the close of a fiscal year, since there is not available an inventory as of such date, nor a list of accounts payable or of expenses accrued as of such date, [fol. 150] nor summary of amounts receivable on sales and consignments, nor book entries or data from which taxes and overhead applicable to the period could be accurately estimated. The reason for using a fiscal year ending March 31st is that the business of the corporation reduces sharply after the middle of February, so that by March 31st there is a minimum of incompleted transactions. The accountants advise further that an audit, as of the end of a nine-months' period, would cost the corporation about $1,500, merely to obtain a questionable estimate of net worth at that time.

Interrogatory No. 3: What were the gross receipts of South Florida Growers Association, Inc. from all business during the fiscal year ending March 31, 1955?

Answer: $1,476,353.07.

Interrogatory No. 4: What were the gross receipts of South Florida Growers Association, Inc. from all business during the fiscal year ending March 31, 1956?

Answer: $1,660,492.97.

Interrogatory No. 5: What were the gross receipts of South Florida Growers Association, Inc. from all business during the fiscal year ending March 31, 1957?

Answer: $1,718,098.70.

Interrogatory No. 6: What were the gross receipts of South Florida Growers Association, Inc. from all business from April 1, 1957 to December 31, 1957?

Answer: No such figure is available and no dependable estimate could be made. (See answer to Interrogatory No. 2.)

Interrogatory No. 7: What were the gross receipts of [fol. 151] South Florida Growers Association, Inc. from the sale of avocados during the fiscal year ending March 31, 1955?

Answer: $820,068.00.

Interrogatory No. 8: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados during the fiscal year ending March 31, 1956?

Answer: $993,409.00.

Interrogatory No. 9: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados during the fiscal year ending March 31, 1957?

Answer: $1,006,241.00.

Interrogatory No. 10: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados during the period from April 1, 1957 to December 31, 1957?

Answer: No such figure is available and no dependable estimate could be made. (See answer to Interrogatory No. 2.)

Interrogatory No. 11: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1955?

Answer: $78,905.31.

Interrogatory No. 12: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados in California in the fiscal year ending March 31, 1956?

Answer: $129,543.11.

Interrogatory No. 13: What were the gross receipts of South Florida Growers Association, Inc. from the sale of [fol. 152] avocados in California during the fiscal year ending March 31, 1957?

Answer: $15,065.68.

Interrogatory No. 14: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados in California during the period from April 1, 1957 to December 31, 1957?

Answer: $11,861.78.

Harold E. Kendall

Duly sworn to by Harold E. Kendall, jurat omitted in printing.

[fol. 153] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ANSWERS OF FRED PIOWATY, SECRETARY OF PLAINTIFF FLORIDA LIME AND AVOCADO GROWERS, INC., TO DEFENDANTS' INTERROGATORIES—Filed April 8, 1958

Interrogatory No. 1: What was the net worth of Florida Lime and Avocado Growers, Inc. as of the close of its last fiscal year, March 31, 1957?

Answer: $100,760.64.

Interrogatory No. 2: What was the net worth of Florida Lime and Avocado Growers, Inc. as of December 31, 1957?

Answer: No statement of net worth as of December 31, 1957 is available, since no audit was made as of this date, but only at the close of the fiscal year on March 31, 1957. Affiant is advised by the company's accountants that a net worth figure as of December 31, 1957 could be approximated only by a complete audit of the company's financial condition on that date; that such audit would necessarily include qualifications as to various items not known [fol. 154] or ascertainable as of the end of a nine-months' period such as April 1, 1957 to December 31, 1957; that such audit would take about six weeks and cost about $2,000, and could produce only an estimate that could not be verified.

Interrogatory No. 3: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1955?

Answer: $447,526.77.

Interrogatory No. 4: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1956?

Answer: $609,125.02.

Interrogatory No. 5: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1957?

Answer: $546,737.85.

Interrogatory No. 6: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business from April 1, 1957 to December 31, 1957?

Answer: $399,657.99.

Interrogatory No. 7: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1955?

Answer: $205,432.44.

Interrogatory No. 8: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1956?

Answer: $323,143.93.

[fol. 155] Interrogatory No. 9: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1957?

Answer: $233,358.46.

Interrogatory No. 10: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the period from April 1, 1957, to December 31, 1957?

Answer: $165,390.98.

Interrogatory No. 11: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1955?

Answer: $94,553.62.

Interrogatory No. 12: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1956?

Answer: $56,616.51.

Interrogatory No. 13: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1957?

Answer: $26,332.53.

Interrogatory No. 14: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the period from April 1, 1957 to December 31, 1957?

Answer: $13,906.66.

Fred Piowaty

[fol. 156] *Duly sworn to by Fred Piowaty, jurat omitted in printing.*

[fol. 165]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ARGUMENT AND SUBMISSION ON MOTIONS—April 18, 1958

This case came on regularly this day for a hearing by a three Judge Court on the motions to dismiss or for an order staying proceedings. Isaac E. Ferguson, Esq., was present for and on behalf of the plaintiffs. John Fourt, Esq., Deputy Attorney General was present for and on behalf of the defendants. After hearing counsel, it is Ordered that the motions to dismiss or for an order staying proceedings be and the same are hereby Submitted.

[fol. 166] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U.S.C.A. §§2281 and 2284.

Plaintiffs are Florida growers and packers of avocados and, concededly, are engaged in the interstate marketing of their product. They complain of the barrier which [fol. 167] certain portions of the California Agricultural Code assertedly presents to the importation of their product into the State of California.

Division 5 ("Standardization"), Chapter 2 ("Fruit, Nut and Vegetable Standards"), of the California Agricultural Code, sets out a comprehensive system of packing, marketing and quality control of agricultural products including, *inter alia*, avocados. Plaintiffs first encounter this control as their fruit enters California, inspection being had at the familiar agricultural inspection stations located at the border wherever a highway enters the State (§782.6).[1] There the load is sampled (§782), and if the fruit fails to meet the standards imposed by any pertinent section of the Agricultural Code (§785), the load is tagged as nonconforming fruit. Such noncomplying fruit is declared a nuisance and, if not reconditioned, is subject to seizure and eventual abatement as a nuisance (§785).

Reconditioning would involve, here, the substitution of qualified fruit for that found lacking, when weighed against the standards fixed by Chapter 2. The specific standard of which plaintiffs complain is that found in §792, which requires that all avocados contain not less than 8% oil by weight, excluding the skin and seed.

Plaintiffs allege that the variety of avocado grown by [fol. 168] them in Florida differs from those grown in California in that they inherently possess a lesser percentage of oil by weight than those cultivated in California; that the varieties which they would introduce into California seldom meet the oil test of §792 at the time when they are in prime marketing condition.

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[1] All references in this opinion to sections are to sections of the Agricultural Code of the State of California unless otherwise specifically noted.

It is further alleged that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standard imposed by §792, and that those nonconforming loads were not reconditioned by substitution, but were removed from the State and marketed elsewhere (§785).

On the above stated facts, plaintiffs ask this Court for certain declaratory and injunctive relief. Such relief cannot be granted as this Court lacks jurisdiction of the cause.

The basic rule is that this Court is a Court of limited jurisdiction, and has no authority beyond that specifically granted it by law. The jurisdiction of this Court is never presumed. The presumption is to the contrary (*Lehigh Mining & Manufacturing Co.* vs. *Kelly*, 160 U. S. 327; *United States* vs. *Green*, 107 F. 2d 19, and *Durkey* vs. *Arndt*, 46 F. Supp. 256). The first principle of Federal jurisdiction is that it is the duty of litigants to make clear to the Court the basis of its jurisdiction over the proceeding. Likewise, it is the duty of the Court to make sure that jurisdiction exists. If Federal jurisdiction is not apparent, the Court not only will, but must, refuse to proceed with [fol. 169] the determination of the merits of the controversy, unless this failure can be cured. This is true regardless of what stage the case may be in, and whether the defect is called to the Court's attention by suggestion of the parties, or otherwise (*Mansfield, C. & L. M. Railway Co.* vs. *Swan*, 111 U. S. 379; *Warner* vs. *Territory of Hawaii*, 206 F. 2d 851; *Koike* vs. *Atchison, T. & S. Ry. Co.*, 157 Fed. 623; *Skelly* vs. *Dockweiler*, 75 F. Supp. 11; and *American Distilling Co.* vs. *City of Sausalito*, 73 F. Supp. 520).

The jurisdiction of a Federal District Court finds its initial limitation in the ultimate source of the Court's authority, namely, the Constitution of the United States. A matter, to be justiciable, must be capable of categorization as either a "case" or a "controversy" (United States Constitution, Art. 3). While a wide variety of forms of action and remedies are permissible, the complaint—as a Constitutional prerequisite to the assumption of jurisdiction by a Federal court—must show that the case presents for determination *an existing dispute as to present legal rights*. When this is not affirmatively shown, the case must

be disposed of as provided by the Federal Rules of Civil Procedure, §12(h)(2), where it is decreed that, ". . . Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual controversy could arise only if there were a co-existence of four facts, [fol. 170] namely:

1. The bringing of avocados to California by plaintiffs;

2. The failure of avocados to meet the standards fixed by law;

3. The refusal of the plaintiffs to recondition or remove the avocados; and

4. An election by plaintiffs to contest the abatement in the State courts as provided by §785.

This lack of a present, actual, existing controversy concludes the jurisdiction of this Court (*Muskrat* vs. *United States,* 219 U. S. 346). The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues (*Aetna Life Insurance Co.* vs. *Haworth,* 300 U. S. 227). The record now before this Court shows no more than a mere prospect of interference posed by the bare existence of the law in question (*United Public Workers* vs. *Mitchell,* 330 U. S. 75; and *Wycoff Co., Inc.* vs. *Public Service Comm'n of Utah,* 344 U. S. 237; cf.: *Ramspeck* vs. *Federal Trial Examiners,* 345 U. S. 128). On the record now before it, this Court has no authority to take jurisdiction in this case, and is left with no course other than to dismiss the action at this time.

Defendants have filed motions to dismiss this action on a variety of grounds, all of them being premised on various subsections of Federal Rules of Civil Procedure §12. Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss.

[fol. 171] It Is, Therefore, Ordered that plaintiffs' complaint and the cause of action sought to be set forth in said complaint be, and the same is, hereby dismissed.

Dated: December 17th, 1958.

Albert Lee Stephens, Chief Judge, United States Court of Appeals for the Ninth Circuit.

Louis E. Goodman, Chief Judge, United States District Court for the Northern District of California.

Sherrill Halbert, United States District Judge.

[fol. 172] Affidavit of Service by Mail (omitted in printing).

[fol. 175] [File endorsement omitted]

In United States District Court for the Northern District of California, Northern Division

No. 7648 Civil Action

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs,

vs.

W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, Defendants.

Judgment—January 13, 1959

This cause came on for hearing on April 18, 1958, on defendants' motion to dismiss the action because the plaintiffs' complaint failed to allege facts showing a cause of action within the jurisdiction of the United States District Court, and the court having heard the argument of counsel, both written and oral, and having considered the depositions, affidavits, and exhibits presented by the parties hereto

in connection with the hearing thereof, and the court being fully advised, it is by the Court, this 13th day of January, 1959,

[fol. 176] Ordered that said motion be granted, and that the complaint be and it is hereby dismissed for want of jurisdiction for the reasons set out in the opinion of the Court filed herein on December 17, 1958, and that defendants recover their costs.

Dated: January 13, 1959.

Sherrill Halbert, United States District Judge.

[fol. 177] Affidavit of Service by Mail (omitted in printing).

[fol. 194]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, defendants.

MOTION OF PLAINTIFFS TO AMEND COMPLAINT BY NAMING PRESENT GOVERNOR AND ATTORNEY GENERAL AS DEFENDANTS, IN SUBSTITUTION FOR FORMER GOVERNOR AND ATTORNEY GENERAL—Filed February 2, 1959

The plaintiffs, Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, by their undersigned attorney of record, move the court to grant leave to amend the plaintiffs' complaint; (1) by describing the defendant Edmund G. Brown as governor of the State of

California, in lieu of attorney general, and (2) by naming the present attorney general of the State of California, Stanley Mosk, as a party defendant.

As grounds of this motion, plaintiffs represent to the court as follows:

1. Plaintiffs filed their complaint under sections 1331 and 1337 of the Judicial Code and prayed for a hearing of the case by a three-judge court pursuant to sections 2281 [fol. 195] and 2284 of the Judicial Code. Since the action involves the operation of a statute of the state of California, namely, section 792 of the Agricultural Code of California, and since section 2284(2) of the Judicial Code requires that notice of hearing of such an action be given to the governor and attorney general of the state, plaintiffs complied with this requirement by naming as co-defendants Goodwin J. Knight, then governor of California, and Edmund G. Brown, then attorney general of California, together with W. C. Jacobsen, director of the Department of Agriculture of California, and by causing service of summons to be made on said defendants.

2. Thereupon said defendants filed their joint answer to plaintiffs' complaint, also their joint motion for dismissal of the complaint or alternatively for an order staying the action pending resolution of issues of state law by the California courts. Upon hearing and consideration of said motion, the court filed its "Memorandum and Order" on December 17, 1958, and on January 13, 1959 entered its final judgment dismissing plaintiffs' complaint for want of jurisdiction and awarding costs to the defendants.

3. Plaintiffs have directed their attorney of record in this action to prosecute an appeal from said judgment to the Supreme Court of the United States, as provided by section 1253 of the Judicial Code, and in further compliance with section 2284(2) of the Judicial Code desire to give notice of such appeal to the present governor and attorney general of California.

4. On January 5, 1959 the term of office of Goodwin J. Knight as governor of California expired and Edmund G. Brown, having been duly elected as governor, took office as governor and still continues to hold said office. On the

same day Stanley Mosk took office as Attorney General of [fol. 196] California, the term of office of Edmund G. Brown as attorney general having expired and Stanley Mosk having been duly elected to said office, which he still holds.

5. There is substantial need for continuing this action against Edmund G. Brown in his present capacity as governor of California in lieu of his former capacity as attorney general, also substantial need to join as a party defendant the present attorney general, Stanley Mosk, (a) in order to facilitate service of notice on said governor and attorney general of the further proceedings in this action, in compliance with section 2284(2) of the Judicial Code, and (b) because said governor and attorney general, together with the defendant W. C. Jacobsen, who still holds office as Director of Agriculture of the State of California, are the chief officers of the state in charge of enforcement of section 792 of the Agricultural Code of California and are now continuing to enforce said statute, which plaintiffs aver to be in violation of the Constitution of the United States in the respects alleged in plaintiffs' complaint.

6. Since January 5, 1959 the present attorney general, Stanley Mosk, has participated in the proceedings in this case as attorney for the defendants, together with John Fourt, deputy attorney general.

Wherefore plaintiffs pray for leave to amend and supplement their complaint: (1) by changing the designation of the defendant Edmund G. Brown from Attorney General of California to Governor of California; (2) by adding as a party defendant the present Attorney General of California, Stanley Mosk; (3) by striking out the name of Goodwin J. Knight, the former governor, as a party defendant; —all proceedings in the case to stand as if said [fol. 197] Edmund G. Brown had originally been designated in the complaint as governor and as if Stanley Mosk had originally been named as attorney general.

Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., plaintiffs, By: Isaac E. Ferguson, attorney for plaintiffs.

Duly sworn to by Isaac E. Ferguson, jurat omitted in printing.

[fol. 205] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, defendants.

SPECIAL APPEARANCE IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT COMPLAINT—Filed February 9, 1959

Come now the petitioners, Edmund G. Brown, Governor, State of California, and Stanley Mosk, Attorney General, State of California, and appear in the above-entitled action, *specially only*, and for the sole purpose of opposing plaintiff's motion for leave to amend and supplement their complaint (1) by describing the defendant Edmund G. Brown as Governor instead of as Attorney General, State of California, and (2) by naming Stanley Mosk, Attorney General, State of California, as a party defendant, in substitution of [fol. 206] Edmund G. Brown, former Attorney General, State of California. Plaintiff's motion leaves unchanged the allegations in the body of the complaint. Petitioners oppose and object to plaintiffs' said motion on the following grounds:

It is fundamental that a suit in the federal courts to enjoin a public officer from enforcing a statute is personal, and, in the absence of statutory provision for continuing it against his successor in office, the action abates upon his death or retirement from office (*Pullman Co.* v. *Croom*, 231 U.S. 571, 576; *United States* v. *Boutwell*, 17 Wall. 604). A successor in public office is not privy to his predecessor in respect of the alleged wrongful conduct (*Pennoyer* v. *Mc-*

Connaughy, 140 U.S. 1, 10; *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600, 603-604; *Philadelphia Company* v. *Stimson*, 223 U.S. 605, 620-621; *Irwin* v. *Wright*, 258 U.S. 219, 222). These principles are necessarily applicable to suits against state officers, because suits against such persons in their capacity as state officers constitute suits against a state in contravention of the Eleventh Amendment (*Ex parte Ayers*, 123 U.S. 443; *Minnesota* v. *Hitchcock*, 185 U.S. 373; *Fitts* v. *McGhee*, 172 U.S. 516; *In re State of New York*, 256 U.S. 490).

Plaintiffs' suit to enjoin enforcement of California Agricultural Code sections 784 and 792 was ordered dismissed by this court on December 17, 1958, for the reason that no case or controversy existed under Article 3 of the United States Constitution. Subsequently, on January 5, 1959, the terms of office of former Governor Goodwin J. Knight and of former Attorney General Edmund G. Brown expired. On the same date, petitioner Edmund G. Brown became Governor, and petitioner Stanley Mosk became Attorney General, [fol. 207] of the State of California.

Plaintiffs' motion comes within Rule 25(d), Federal Rules of Civil Procedure (28 U.S.C.). This rule, which is not cited by plaintiffs, provides:

> *Substitution of Parties*
>
> * * *
>
> "(d) *Public Officers; Death or Separation from Office.* When an officer of . . . a state . . . is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable

notice of the application therefor and accorded an opportunity to object."

As grounds for the substitution, plaintiffs' application merely states they desire to appeal the order of dismissal, that the substitution will "facilitate service of notice" on the incumbent state Governor and Attorney General, and that said incumbent state officers "are now continuing to enforce said statute" (Plfs. motion, p. 3).

It is apparent that notices and legal process can be served [fol. 208] upon petitioners without their being joined as party defendants, and plaintiffs' first ground for substitution is clearly untenable. Plaintiffs allege as a second ground that petitioners are continuing to enforce these state laws. This statement sets forth only the legal conclusion of the pleader and does not state facts showing the commission of personal trespasses or wrongs which would justify the application of the extraordinary remedy of injunction (*Fitts* v. *McGhee*, *supra*, 172 U.S. 516, 528; *Watson* v. *Buck*, 313 U.S. 387, 400). The plaintiffs' motion makes no allegation of fact from which it can be concluded that either the petitioner Governor Brown or Attorney General Mosk have threatened specific legal action of any kind against the plaintiffs. Plaintiffs' right to perfect its appeal remains intact since W. C. Jacobsen, State Director of Agriculture, remains a party defendant.

As contrasted to the defendant Jacobsen, neither the petitioner Governor Brown, nor petitioner Attorney General Mosk, are specifically charged with the execution of sections 784 and 792, California Agricultural Code. For example, the direct enforcement of these statutes is vested in the Director of Agriculture and the Agricultural Commissioner of each county (Agr. Code, sec. 782), and actions to abate loads of fruits and vegetables as nuisances are filed by District Attorneys of the various counties in the name of the People of the State of California (Agr. Code, sec. 785). These facts make applicable *Fitts* v. *McGhee*, *supra*, 172 U.S. 516, 529, where the court held:

> "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitu-

tional statute, from committing by some positive act [fol. 209] a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

In actual fact it would be impossible for either petitioner to have threatened action of any kind against the plaintiffs since January 5, 1959, because there have been no commercial shipments of Florida avocados received in Cali- [fol. 210] fornia during the last eleven months and consequently no opportunity for the application of California law during this time to the plaintiffs' avocados (Affidavit of S. R. Whipple, attached hereto as Exhibit A).

Plaintiffs' motion is ill taken under *Ex Parte La Prade*, 289 U.S. 444, a case in which several railroads filed suit in a federal district court against one Peterson, then Attorney General of the State of Arizona, to restrain enforcement by him of an Arizona train length statute. After hear-

ing, but before judgment, Peterson's term of office expired, and one La Prade became Attorney General. The United States Supreme Court affirmed the refusal by the district court to substitute petitioner La Prade for defendant Peterson as a party, saying:

> "As shown above, the purpose of the suits was to prevent a wrong about to be committed by defendant acting outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. United States Constitution, Art. VI, cl. 3. Arizona Revised Code, 1928, sec. 63. . . .
>
> "It follows from what has been said that §780 (for- [fol. 211] mer sec. 28, U.S.C. 780, now Rule 25(d), Federal Rules of Civil Procedure) has no application to the case as presented and that the district court had no jurisdiction to substitute petitioner as a party defendant in place of his predecessor or to direct that the suits be continued and maintained against him. We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved" (289 U.S. at 458-459).

Also in point is *Ex Parte Poresky*, 290 U.S. 30, where the Supreme Court approved dismissals by the federal district court as to the Governor and Attorney General of Massachusetts, upon the ground they were improperly joined as parties, where plaintiffs' real grievance was against the defendant Massachusetts Registrar of Motor Vehicles, who had refused to issue plaintiff registration and number

plates under a Massachusetts compulsory automobile liability insurance statute.

Petitioners submit that plaintiffs can obtain all the relief to which they are entitled, including their right of appeal, against the defendant W. C. Jacobsen, the State Director of Agriculture. Plaintiffs have made no showing either in their complaint, or in this motion, that petitioners Edmund G. Brown and Stanley Mosk have threatened to enforce these statutes against plaintiffs. Neither have the plaintiffs shown that there is a substantial need for continuing this action against these moving petitioners as required by Rule 25(d), Federal Rules of Civil Procedure.

[fol. 212] Wherefore, petitioners pray that plaintiffs' motion be denied.

Respectfully submitted,

Stanley Mosk Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 213]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

EXHIBIT "A"—AFFIDAVIT OF S. R. WHIPPLE

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO) ss.:

Comes now S. R. WHIPPLE and deposes and says:

That he is Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agriculture; that he has held said position since August, 1945; that in such position he is charged with the duty of supervising the inspection work performed by inspectors of the Bureau of Fruit and Vegetable Standardization and the California [fol. 214] County Agricultural Commissioners and their staffs in the inspection of avocados found in California wholesale terminal markets in the enforcement of section

792 of the California Agricultural Code, which requires that avocados offered for sale, among other things, also must meet a minimum oil content requirement of eight per cent (8%). That in such capacity he has access to and is familiar with the records pertaining to avocados marketed in California maintained by the Director of Agriculture and more particularly maintained by the California Department of Agriculture Bureaus of Fruit and Vegetable Standardization; Market News, and Agricultural Statistics.

That the official records maintained by the California Department of Agriculture Bureaus of Fruit and Vegetable Standardization, Market News, and Agricultural Statistics, show that no commercial shipments of avocados grown in Florida arrived in California for purposes of sale or otherwise during the period of time March 1, 1958, to February 5, 1959; that affiant has confirmed the reliability of these records by the receipt of reports from the County Agricultural Commissioners of the Counties of Los Angeles, Alameda and San Francisco, the principal receiving areas in California for avocados grown in Florida; that the records in the offices of said County Agricultural Commissioners disclose that no Florida avocados were inspected nor offered for inspection in their respective counties during the period of time March 1, 1958, to February 5, 1959.

s/ S. R. WHIPPLE
S. R. Whipple

Subscribed and sworn to
before me this 5th day
of February, 1959.

(SEAL) LAURA M. MIDDLETON
Notary Public in and for the
County of Sacramento,
State of California.

[fol. 215] Affidavit of Service by Mail (omitted in printing).

[fol. 216] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 12, 1959

I.

Notice is hereby given that Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., the above named plaintiffs, hereby appeal to the Supreme Court of the United States from the final judgment dismissing plaintiff's complaint for want of jurisdiction, entered in this action on January 13, 1959.

This appeal is taken pursuant to 28 U.S.C.A. section 1253.

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 217] Court of the United States, and include in said transcript the following:

1. Complaint filed November 13, 1957.
2. Summons and return filed November 22, 1957.
3. Answer of defendants filed December 6, 1957.

4. Answer of defendants filed December 6, 1957. (Omit affidavit of service.)

5. Request of plaintiffs to set case for trial at early convenience of court, filed February 24, 1958. (Omit notice of motion and certificate of service.)

6. Interrogatories propounded by plaintiffs to defendant W. C. Jacobsen, filed February 24, 1958.

7. Answers of W. C. Jacobsen to interrogatories, filed March 6, 1958.

8. Answers of Harold E. Kendall to defendants' interrogatories, filed April 8, 1958.

9. Answers of Fred Piowaty to defendants' interrogatories, filed April 8, 1958.

10. Amended answer of defendants to plaintiffs' complaint, filed March 20, 1958.

11. Depositions of R. M. Wimbish, David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty, together with exhibits, filed March 14, 1958.

12. Notice of motion by defendants, directed to Florida Lime and Avocado Growers, Inc., for an order dismissing the action, or alternatively for stay of proceedings, filed March 14, 1958. (Omit affidavit of service.)

13. Notice of motion by defendants, directed to South Florida Growers Association, Inc., for an order dismissing the action, or alternatively for stay of proceedings, filed March 14, 1958. (Omit all portions after page 2, as identical with all pages of Item 12 following page 2.)

[fol. 218] 14. Plaintiffs' memorandum in opposition to defendants' motion to dismiss action, filed March 31, 1958.

15. Defendants' closing points and authorities in support of motion to dismiss action, filed April 9, 1958. (Omit affidavit of service.)

16. Docket entry April 18, 1958, *re* hearing on that date.

17. Memorandum and order of court filed December 17, 1958.

18. Proposed judgment order lodged by defendants December 24, 1958. (Omit affidavit of service.)

19. Final judgment filed and entered January 13, 1959.

20. Notice by clerk of entry of judgment, mailed January 13, 1959.

21. Notice of entry of judgment mailed by defendants' attorneys to plaintiffs' attorney January 14, 1959.

21. Notice of appeal to Supreme Court of United States.

III.

The question presented by the appeal and the circumstances under which it arises.

Did the three-judge district court properly dismiss the action, without a trial, for alleged lack of a present controversy cognizable by the court within its constitutional jurisdiction?

To indicate the circumstances of the case infolded in the question presented by the appeal, an outline is submitted of the state of the record at the time of the court's decision.

Complaint: The action was instituted under 28 U.S.C.A. 1331 and 1337 by two large-scale handlers of Florida avocados, who since June 11, 1954 have been engaged in interstate commerce in avocados grown in South Florida under a marketing agreement then made by the Secretary of Agriculture of the United States, acting pursuant to the authority vested in him by the Marketing Agreement Act of 1937 (7 U.S.C.A. 601 *et seq.*), and the growers and handlers [fol. 219] of such avocados. The relief sought is declaratory judgment and injunction to restrain further enforcement against appellants of the statute of California (Agricultural Code 792) prohibiting sale in that state of avocados containing less than 8% oil, at the civil and criminal penalties prescribed in other sections of the Agricultural Code (784, 785, 785.6, 786, 831).

In essence, the complaint is that the varieties of avocados grown in Florida, due to the origin of these varieties and the climatic conditions under which they are grown, are of low oil content and seldom attain 8% of oil at maturity, in

contrast with the avocados of high oil content produced in California; that a requirement of 8% oil content, when applied to the avocados grown in Florida, is not a valid standard of maturity or quality and serves only to maintain an arbitrary embargo against the marketing of Florida avocados in California; that the avocados shipped by appellants in interstate commerce, notwithstanding low oil content, are mature, wholesome and in compliance with the standards of maturity and quality established by the Secretary of Agriculture pursuant to the authority vested in him by the Marketing Agreement Act of 1937 and the South Florida avocado marketing agreement, but that appellants have nevertheless been and continue to be frustrated in their attempts to avail themselves of the California market for their fruit by the barrier of the 8% oil content requirement;* that continued enforcement against appellants of section 792 of the Agricultural Code of California is in contravention of the commerce clause of the United States Constitution (article I, section 8, sub-clause 3) and the equal protection provision of section 1 of the Fourteenth Amendment.

[fol. 220] Answer: Appellees filed a joint answer to the complaint, replaced by an amended answer, pleading six defenses: (1) general demurrer; (2) lack of jurisdiction; (3) seriatim reply to each of the paragraphs of the complaint, admitting or denying the allegations of the various paragraphs; (4) that appellants should be required to set up the invalidity of the challenged statute in the state court; (5) that the quality and maturity standards promulgated under the marketing agreement governing avocados grown in South Florida, and the methods and procedures used in the administration thereof, are invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937; (6) that sections 784 and 792 of the California Agricultural Code constitute a legitimate exercise of the state police power.

Motion to dismiss: Following the filing of depositions taken in Miami, Florida, appellees filed identical motions

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* Particular attention is directed to the allegations of the complaint regarding appellants' attempt to market their avocados in California (paragraphs XXIV(b), XXV, XXVI, XXVII).

directed to each of the appellants to dismiss the action for failure of the complaint to allege facts showing a cause of action within the equity jurisdiction of the court, lack of jurisdiction under 28 U.S.C.A. 1331 or 1337, and failure of the complaint to state a claim against the appellees upon which relief can be granted. Appellees moved the court, in the alternative, to hold the case in abeyance pending an authoritative interpretation of the challenged California statutes and regulations by the California courts.* The motion was said to be based on the pleadings, affidavits filed with the motion and the depositions and answers to interrogatories then on file.

Hearing and ruling: Appellees motions to dismiss the action were heard and submitted April 18, 1958. On De- [fol. 221] cember 17, 1958, a "Memorandum and Order" of the court was filed, holding that there is no claim here of a present existing controversy between the parties; that an actual controversy could arise only if there was a coexistence of four facts, (1) the bringing of avocados to California by appellants, (2) failure of the avocados to meet the standards fixed by law, (3) refusal of appellants to recondition or remove the avocados, and (4) an election by appellants to contest the abatement in the state courts as provided by section 785 of the Agricultural Code of California.

Effect of ruling: The court's formula for "a present existing controversy" ignores the continuous effect of the 8% oil requirement to bar most Florida avocados from California, by far the most favorable market for this fruit in the United States. Also, the effect of the formula is to preclude forever a trial of appellants' complaint in the federal court.

Section 785 of the California Agricultural Code provides for court procedure to review a determination by an enforcing officer that a certain lot of fruit is not in compliance with the applicable standardization provisions of the Code, also to consider the manner of disposing of the noncom-

* No question is raised in the complaint regarding the method for testing oil content of avocados prescribed by the Director of Agriculture of California, or of the accuracy of the test in any instance.

plying fruit. In the case of perishable fruit, such as avocados, upon the filing of a petition by the enforcing officer to abate the nuisance, the court may forthwith order that the fruit be destroyed or the nuisance otherwise abated. It is not apparent how the issues raised in appellants' complaint under the Constitution of the United States could be presented in a proceeding under section 785 of the California Agricultural Code. Even so, the question on this appeal is intended to include the question whether the appellants may thus be barred from trial of their complaint by the federal court.

Isaac E. Ferguson, Attorney, Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc.

[fol. 222] Proof of Service (omitted in printing).

[fol. 223] Defendants'-Appellees' Designation of Record on Appeal—Filed February 20, 1959 (omitted in printing).

[fol. 226] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civ. No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

MEMORANDUM AND ORDER RE: AMENDMENT AND SUBSTITUTION—Filed February 20, 1959

Plaintiffs have heretofore instituted suit against certain officials of the State of California by which an injunction

was sought against the enforcement of allegedly unconstitutional portions of the California Agricultural Code. That suit was ordered dismissed for lack of jurisdiction. Subsequently the term of office of the then Governor and Attorney General, joined as defendants in the complaint, [fol. 227] expired, and Edmund G. Brown and Stanley Mosk, respectively, have succeeded to those positions.

Before noticing their appeal, which has since been perfected, plaintiffs moved to amend and supplement their complaint insofar as its caption was concerned, by substituting these new holders of the office of Governor and Attorney General of the State of California respectively, as parties defendant (Federal Rules of Civil Procedure, Rule 25(d)). Both Brown and Mosk have appeared specially in opposition to this motion.

At argument it appeared that the original officers had been joined out of a commendable abundance of caution, it not being clear whether they were entitled merely to notice, or whether they were made proper parties to the action by statute (Title 28 U.S.C.A. §2284(2)). It further appeared that the motion was being resisted principally on the ground that any action taken by this Court might be construed as inconsistent with the judgment of dismissal, heretofore rendered, and so might breathe new life into the matter.

There is no need to reach the problem of whether this Court has the power to modify the pleadings of an action dismissed for want of jurisdiction as substitution under Rule 25(d) is restricted in its application to substitution of proper parties (*Schwartz* vs. *Metropolitan Life Ins. Co.*, 2 F.R.D. 167). In their motion plaintiffs have failed to show either that the Governor and the Attorney General are proper parties, or that there is a substantial need for the substitution of the names of the new holders of those State [fol. 228] offices (Federal Rules of Civil Procedure, Rule 25(d), and *Danenberg* vs. *Cohen*, 213 F. 2d 944).

As the power to find this Court in error, and allow the substitution sought in the instant motion, subsists at the appellate level, it does not appear that the denial of plaintiffs' motion will in any way prejudice or reduce plaintiffs' rights.

It is, Therefore, Ordered that plaintiffs' motion to amend their complaint, through substitution of new office holders, be, and the same is, hereby denied.

Dated: February 20, 1959.

Sherrill Halbert, United States District Judge.

[fol. 230] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ORDER THAT ORIGINAL RECORDS BE FORWARDED TO SUPREME COURT—Filed March 2, 1959

Pursuant to the motion of defendants-appellees to transmit the original record on appeal of the above-entitled cause to the Supreme Court of the United States;

It Is Hereby Ordered that the depositions of David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall, Fred Piowaty, and R. M. Wimbish, and exhibits attached thereto, received in the District Court as part of the motions to dismiss plaintiffs' complaints filed by defendants-appellees, may all be forwarded in lieu of copies of such documents and papers to the Clerk of the Supreme Court of the United [fol. 231] States as a part of the transcript of the record on appeal herein.

Dated: Mar. 2, 1959

Sherrill Halbert, United States District Judge.

[fol. 234] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ORDER STAYING JUDGMENT—Filed March 2, 1959

Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., plaintiffs herein, having

appealed to the Supreme Court of the United States from the judgment dismissing their complaints entered on January 13, 1959, and having presented a stipulation of counsel of record for both parties authorizing an order staying said judgment,

Now, Therefore, It Is Hereby Ordered that said judgment of January 13, 1959, be, and the same is, hereby stayed in all respects until the disposition of said appeal, the bond for costs of the Fidelity and Deposit Company of Maryland [fol. 235] heretofore filed by plaintiffs-appellants to remain on file as a supersedeas bond.

Dated: Mar. 2, 1959

Sherrill Halbert, United States District Judge.

[fol. 236]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER POSTPONING JURISDICTION—Filed June 22, 1959

Appeal from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 22, 1959.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

APPEARANCES:

Mr. John E. Fourt, Deputy Attorney General of the State of California, Library-Courts Building, Sacramento, California, on behalf of defendants.

Mr. William A. Norris, of the firm of Tuttle, Tuttle and Taylor, 711 Equitable Life Building, 411 West Fifth Street, Los Angeles, California, on behalf of Calavo Growers of California.

COLLOQUY AMONG COUNSEL

Mr. Ferguson: The depositions to be taken here today and tomorrow are being taken pursuant to stipulation of counsel, a copy of which has been given the Notary Public, and it is requested that the stipulation be annexed to the depositions when completed.

Mr. Norris: My name is William A. Norris, of the Los Angeles law firm of Tuttle, Tuttle and Taylor, general counsel for Calavo Growers of California. Calavo Growers of California proposes to file in the near future a motion to intervene in this action as a party. I am here as counsel for Calavo Growers of California to protect their interests during the course of these depositions.

Mr. Ferguson: On behalf of the plaintiffs, I welcome the presence of Mr. Norris, and have no objection to his participation in the taking of these depositions. Of course there is nothing to say at this time about the proposed request of Calavo Growers of California to be permitted [fol. 3] to intervene as a party in this case, but if Mr. Norris wants me to say something about it at this time, I will be glad to do so.

Mr. Norris: I think in fairness to you, Mr. Ferguson, that my participation here at this time should be without prejudice to any position you may want to take with respect to intervention later on.

Mr. Ferguson: My thought now is that there will be no objection on the part of the plaintiffs to an intervention if the Court deems it proper, however, our position will be that it must not in any way delay the hearing of this case or complicate the issues thereof.

Mr. Fourt: On behalf of the defendants, Jacobsen, Knight and Brown, we agree to the participation in the taking of these depositions by Calavo Growers of California, and agree to the presence here and to the participation in the depositions of Calavo's attorney, Mr. William A. Norris.

Mr. Ferguson: I request that the Notary Public attach to Mr. Biggar's deposition, when completed, the subpoena pursuant to which Mr. Biggar appears here this morning.

Deposition of David M. Biggar

David M. Biggar, a witness on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Please state your name.

[fol. 4] A. David M. Biggar.

Q. Will you tell us where you live, Mr. Biggar?

A. I live in Homestead, Florida.

Q. What is your occupation?

A. Manager of Avocado Administrative Committee, an organization established by the Secretary of Agriculture of the United States to administer the provisions of Marketing Order 969, regulating the handling of avocados grown in South Florida.

Q. Is that Marketing Agreement number 121?

A. That is the agreement number, ye .

Q. And the order, in shortened form, is 69?

A. 969, or, in the shortened form, 69.

Q. Where is your office?

A. 1102 North Krome Avenue, Homestead, Florida.

Q. Since when have you been manager of the Avocado Administrative Committee of South Florida?

A. Since July, 1954; since the inception of the Marketing Agreement and Order.

Q. What are your duties as manager of Avocado Administrative Committee?

A. My duties are administrative, arranging for meetings and conducting the usual office functions of an office manager, as well as carrying out other administrative duties.

Q. Do you keep all of the Committee's records?

A. Yes, I keep the records of the Committee.

[fol. 5] Q. Does that include the preparation of statistical data deemed of interest to the growers and handlers of avocados who operate under the Federal Marketing Agreement?

A. In the course of my duties and functions, I prepare statistical releases for the industry and am required at the end of each year to issue a report to the Secretary and to all interested growers concerning the activities of the Committee for the current season.

Q. So that you have issued by this time many annual reports?

A. We have issued three annual reports as of this time; one for each season, 1954-55, 1955-56 and 1956-57. Our current fiscal year ends March 31st, and we will issue the fourth report subsequent to that date.

Q. Does that define the season; in other words, do you mean by "season", your fiscal year?

A. It so happens that our fiscal year coincides with our season.

Q. It extends from April 1 of one year to March of the following year?

A. Our fiscal year extends from April 1 through March 31st. Our actual shipping season starts somewhat later and terminates as a rule somewhat later.

Q. Before you became associated with the Avocado Administrative Committee in 1954, had you been a student to some extent in the field of agriculture?

A. Quite.

[fol. 6] Q. Go ahead and tell us about that.

A. I received my Master of Agriculture Degree at the University of Florida in June, 1954. I specialized in the field of agricultural marketing for the purpose of that degree, and took my Bachelor's Degree in Business Administration, with a major in the field of marketing also.

Q. Is it one of your duties as Committee manager to issue licenses to handlers of avocados who meet the requirements of the Marketing Agreement?

A. It is.

Q. I show you two documents entitled "Registered Avocado Handler", to be marked plaintiffs' exhibits 1 and 2 for identification, and ask you if these are the documents which you prepared and issued?

Mr. Fourt: May I see them?

Mr. Ferguson: Yes. Let me have them marked first.

The Witness: They are.

By Mr. Ferguson:

Q. What are they?

A. They are certificates of registration showing that the handlers, Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., have registered with the Avocado Administrative Committee pursuant to the requirements of the Marketing Agreement and Order having to do with the handling of avocados grown in South Florida.

Q. For what period are these registrations effective?

[fol. 7] A. These registrations are effective for the 1957-58 season, or from April 1, 1957 through March 31, 1958.

Q. Were identical licenses issued to the same handlers in prior years?

A. Identical registrations. Of course the form itself varied with the season, but most of these organizations were licensed or registered,—I prefer to use the word registered—for each of the seasons covered by the Federal Marketing Agreement and Order.

Q. That would be since June, 1954?

A. Correct.

Mr. Ferguson: Plaintiffs' exhibits 1 and 2 are offered in evidence, and I would like to have an understanding as to these documents or any other original documents that may be offered in evidence, that photostats may be substituted for the originals.

Mr. Fourt: The defendants, Knight, Jacobsen and Brown, have no objection to the substitution of photostats. However, Mr. Ferguson, we believe it is premature to offer them in evidence at this time. Wouldn't it be better to just have them marked for identification?

Mr. Ferguson: They are now marked for identification. The offer is made to indicate that the interrogation will be followed by an offer of the documents in evidence.

Mr. Fourt: However, we are not stipulating that they may be admitted in evidence.

[fol. 8] Mr. Ferguson: No. I am not asking you to stipulate to their admission. We will leave that for a ruling of the Court. With that clarification, Mr. Fourt, I am ask-

ing only that there be an agreement that the photostats may be offered in lieu of the originals.

Mr. Fourt: It is so stipulated.

Mr. Norris: It is so stipulated by Calavo Growers of California, so long as it is understood that there is no agreement that they are to be admitted in evidence.

Mr. Fourt: Perhaps we can reduce the confusion here if Jacobsen, Brown and Knight are referred to as defendants, and Calavo be referred to as intervener.

Mr. Norris: I will just refer to my client as Calavo Growers of California, as distinguished from any parties.

By Mr. Ferguson:

Q. Mr. Biggar, since 1954 has all of your time been devoted to the problems of the Avocado Industry in Florida in relation to the functioning of the Avocado Administrative Committee?

A. No. I am jointly employed by two Committees, the Avocado Administrative Committee, who were my sole employers for 1954-1955 season. Since 1955-56, I have been employed jointly by the Lime Administrative Committee, a parallel organization to the Avocado Administrative Committee.

Q. What area is embraced in the Federal Marketing Agreement, number 121, or Marketing Order number 69 of [fol. 9] the United States Secretary of Agriculture?

A. Marketing Order 969, and the accompanying Marketing Agreement, as amended, now encompasses the counties of Pinellas, Hillsborough, Polk, Lake, Orange and Brevard, and all counties situated south of a line created by the boundaries of these counties and located south of these counties in the State of Florida.

Q. Does this include the entire area of Florida in which avocados are customarily grown?

A. Yes.

Q. Is there considerable backyard or non-commercial and commercial growing of avocados in Florida?

A. There is considerable commercial and non-commercial growing of avocados in South Florida, yes.

Q. Approximately what is the acreage of commercial production of avocados in Florida?

A. I have been told that the acreage is approximately eleven thousand acres. I have never had cause to question the figure or to check the figure, personally.

Q. Is this in the main a central production area?

A. The bulk of the production, and we estimate this to be approximately ninety percent; in other words, we estimate that the production in Dade County, Florida is ninety percent of the total production.

Mr. Norris: It is understood, is it not, that all objections [fol. 10] as to the admissibility of any of this testimony are reserved for trial, and if we can object on the ground of hearsay at that time we will not necessarily make objections at this time.

By Mr. Ferguson:

Q. Mr. Biggar, you have already mentioned the annual reports of the Avocado Administrative Committee which you have prepared. Is there included in the first annual report for the 1954-55 season a summary of the regulations made by the Secretary of Agriculture, fixing the permissible shipping dates for the various varieties of avocados handled in South Florida?

A. With your permission, Mr. Ferguson, I will refresh my memory on that.

Q. Just go ahead and look at it. Do you have copies?

A. Yes, I have copies of each of these. There is comment on the regulations, but not in a summary form, however, in this particular publication for 1954-1955 season.

Q. Not a schedule of dates?

A. No, sir.

Q. Does the Avocado Administrative Committee receive a copy of each order made by the Secretary of Agriculture under the Marketing Agreement?

A. It does.

Q. Do you have with you at this hearing a complete file of these orders?

A. I do.

[fol. 11] Q. Turning now to the 1955-56 annual report, does this include a reproduction of the schedule of permissible shipping dates for avocados in the 1955-56 season?

A. This schedule makes reference to Avocado Orders numbers 6, 8, 10 and 11, but does not reproduce those orders.

Q. It contains no summarized schedule of shipping dates?

A. It does not.

Q. I direct your attention to pages 16 and 17 of this report entitled "SUMMARY OF AVOCADO SHIPMENTS BY VARIETIES AND BY WEEKS—1955-56 SEASON". Did you prepare this summary?

A. I did.

Q. From what source of information?

A. This information was compiled from copies of the Federal-State Inspection Certificates issued by the United States Department of Agriculture in cooperation with the Florida State Department of Agriculture.

Q. Does the Avocado Administrative Committee receive copies of all inspection certificates?

A. We do.

Q. Issued by the Inspection Service?

A. Yes. May I qualify that?

Q. Yes.

A. I mean pertaining to avocados.

Q. I meant, of course, Mr. Biggar, pertaining to avocados.

A. That is right.

[fol. 12] Mr. Ferguson: Will the reporter mark this document as plaintiffs' exhibit 3 for identification?

By Mr. Ferguson:

Q. Mr. Biggar, I now show you a document marked plaintiffs' exhibit 3 for identification. Is this the type of inspection certificate to which you referred in your last answer?

A. It is.

Q. Does the Committee receive duplicate copies of all such certificates issued by the Federal-State Inspection Service of Florida?

A. Yes, affecting avocados.

Q. This particular certificate is not your file copy, is it?

A. The copy that we received is at present and it has been in the past a green copy of a multiple system.

Q. What color is this one?

A. This one is yellow.

Q. Issued to whom?

A. I am not clear on this: It is one of the copies that we do not receive.

Q. Incidentally, Mr. Biggar, in this certificate, under REMARKS, appear some abbreviations. Will you be good enough to explain those to us?

A. Under REMARKS on this particular certificate, being certificate number B-66158, is the following: "Meets [fol. 13] Florida AAC No. 2 Grade MSO." The term "AAC No. 2 Grade", refers to the Avocado Administrative Committee number 2 grade, as approved by the Secretary of Agriculture. With your permission I will look in my notes here and give you the docket number on that. The "AAC No. 2 Grade" refers to Avocado Administrative Committee Rules and Regulations, Grade Standards, as amended, as reprinted from the Federal Register of April 13, 1956.

Q. I was going to ask you about that at a later point. That explains that.

A. This "AAC No. 2 Grade" contained within that is a grade designation of this document that I referred to.

Q. You mean the number 2 grade stated in the certificate?

A. The number 2 grade under REMARKS—I will read it, "Meets Florida AAC No. 2 Grade"—that is a grade designation within the document referred to before. The "MSO" is a short abbreviation for the terminology "Meets Secretary's Order". That is a terminology used on all certificates to indicate that the fruit described in the certificate has met the provisions of the Federal Marketing Order by the Secretary of Agriculture.

Q. Now, Mr. Biggar, coming back to pages 16 and 17 of the 1955-56 annual report, is this summary of avocado shipments by varieties and weeks, comprising pages 16 and 17 of the Committee's annual report, true and correct?

A. Substantially so, yes.

Q. Now, instead of using the book, Mr. Biggar, I will ask [fol. 14] you if you have other mimeograph—

Mr. Fourt: We have no objection to the book being used.

Mr. Ferguson: I don't want to further encumber the record. If there is anything in the report you want, in addition to these two pages, a prior agreement to admission, all right; however, at the moment I will ask that these two pages be marked plaintiffs' exhibit 4 for identification.

Mr. Fourt: That is agreeable.

Mr. Ferguson: Plaintiffs' exhibit 4 will be offered in evidence. It is marked for indentification only now, and that is all I can do at this time, until the Court rules.

Mr. Fourt: Since I want to be very careful about this record, I desire that it be understood that we are not stipulating to it being admitted in evidence.

Mr. Ferguson: No, but it might guide your cross examination of the witness.

By Mr. Ferguson:

Q. Turning now to page 19 of this 1955-56 annual report, entitled "Composite Supply of Avocados, 1955-56 Season, By Points of Origin",—did you prepare this tabulation?

A. Yes.

Q. From what source?

A. As footnoted on this page, in the case of California, this was from "Estimated from monthly production data" supplied by Calavo Growers of California at my request. Under suggestions made by Calavo Growers of California [fol. 15] concerning distribution, and in some instances—I don't recall the exact period, from estimates made by Calavo Growers of California on periods not yet completed when they supplied the material.

On the Florida information, that was taken or compiled from certificates of inspection received from the Federal Inspection Service.

The Cuban information, as footnoted, was from unpublished records of United States Department of Agriculture Inspection Service, which we received in letter form from the Agriculture Marketing Service in Washington, and they in turn compiled the information from inspection certifi-

was sought against the enforcement of allegedly unconstitutional portions of the California Agricultural Code. That suit was ordered dismissed for lack of jurisdiction. Subsequently the term of office of the then Governor and Attorney General, joined as defendants in the complaint, [fol. 227] expired, and Edmund G. Brown and Stanley Mosk, respectively, have succeeded to those positions.

Before noticing their appeal, which has since been perfected, plaintiffs moved to amend and supplement their complaint insofar as its caption was concerned, by substituting these new holders of the office of Governor and Attorney General of the State of California respectively, as parties defendant (Federal Rules of Civil Procedure, Rule 25(d)). Both Brown and Mosk have appeared specially in opposition to this motion.

At argument it appeared that the original officers had been joined out of a commendable abundance of caution, it not being clear whether they were entitled merely to notice, or whether they were made proper parties to the action by statute (Title 28 U.S.C.A. §2284(2)). It further appeared that the motion was being resisted principally on the ground that any action taken by this Court might be construed as inconsistent with the judgment of dismissal, heretofore rendered, and so might breathe new life into the matter.

There is no need to reach the problem of whether this Court has the power to modify the pleadings of an action dismissed for want of jurisdiction as substitution under Rule 25(d) is restricted in its application to substitution of proper parties (*Schwartz* vs. *Metropolitan Life Ins. Co.*, 2 F.R.D. 167). In their motion plaintiffs have failed to show either that the Governor and the Attorney General are proper parties, or that there is a substantial need for the substitution of the names of the new holders of those State [fol. 228] offices (Federal Rules of Civil Procedure, Rule 25(d), and *Danenberg* vs. *Cohen*, 213 F. 2d 944).

As the power to find this Court in error, and allow the substitution sought in the instant motion, subsists at the appellate level, it does not appear that the denial of plaintiffs' motion will in any way prejudice or reduce plaintiffs' rights.

It is, Therefore, Ordered that plaintiffs' motion to amend their complaint, through substitution of new office holders, be, and the same is, hereby denied.

Dated: February 20, 1959.

Sherrill Halbert, United States District Judge.

[fol. 230] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ORDER THAT ORIGINAL RECORDS BE FORWARDED TO SUPREME COURT—Filed March 2, 1959

Pursuant to the motion of defendants-appellees to transmit the original record on appeal of the above-entitled cause to the Supreme Court of the United States:

It Is Hereby Ordered that the depositions of David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall, Fred Piowaty, and R. M. Wimbish, and exhibits attached thereto, received in the District Court as part of the motions to dismiss plaintiffs' complaints filed by defendants-appellees, may all be forwarded in lieu of copies of such documents and papers to the Clerk of the Supreme Court of the United [fol. 231] States as a part of the transcript of the record on appeal herein.

Dated: Mar. 2, 1959

Sherrill Halbert, United States District Judge.

[fol. 234] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ORDER STAYING JUDGMENT—Filed March 2, 1959

Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., plaintiffs herein, having

appealed to the Supreme Court of the United States from the judgment dismissing their complaints entered on January 13, 1959, and having presented a stipulation of counsel of record for both parties authorizing an order staying said judgment,

Now, Therefore, It Is Hereby Ordered that said judgment of January 13, 1959, be, and the same is, hereby stayed in all respects until the disposition of said appeal, the bond for costs of the Fidelity and Deposit Company of Maryland [fol. 235] heretofore filed by plaintiffs-appellants to remain on file as a supersedeas bond.

Dated: Mar. 2, 1959

Sherrill Halbert, United States District Judge.

[fol. 236]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER POSTPONING JURISDICTION—Filed June 22, 1959

Appeal from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 22, 1959.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

APPEARANCES:

Mr. John E. Fourt, Deputy Attorney General of the State of California, Library-Courts Building, Sacramento, California, on behalf of defendants.

Mr. William A. Norris, of the firm of Tuttle, Tuttle and Taylor, 711 Equitable Life Building, 411 West Fifth Street, Los Angeles, California, on behalf of Calavo Growers of California.

COLLOQUY AMONG COUNSEL.

Mr. Ferguson: The depositions to be taken here today and tomorrow are being taken pursuant to stipulation of counsel, a copy of which has been given the Notary Public, and it is requested that the stipulation be annexed to the depositions when completed.

Mr. Norris: My name is William A. Norris, of the Los Angeles law firm of Tuttle, Tuttle and Taylor, general counsel for Calavo Growers of California. Calavo Growers of California proposes to file in the near future a motion to intervene in this action as a party. I am here as counsel for Calavo Growers of California to protect their interests during the course of these depositions.

Mr. Ferguson: On behalf of the plaintiffs, I welcome the presence of Mr. Norris, and have no objection to his participation in the taking of these depositions. Of course there is nothing to say at this time about the proposed request of Calavo Growers of California to be permitted [fol. 3] to intervene as a party in this case, but if Mr. Norris wants me to say something about it at this time, I will be glad to do so.

Mr. Norris: I think in fairness to you, Mr. Ferguson, that my participation here at this time should be without prejudice to any position you may want to take with respect to intervention later on.

Mr. Ferguson: My thought now is that there will be no objection on the part of the plaintiffs to an intervention if the Court deems it proper, however, our position will be that it must not in any way delay the hearing of this case or complicate the issues thereof.

Mr. Fourt: On behalf of the defendants, Jacobsen, Knight and Brown, we agree to the participation in the taking of these depositions by Calavo Growers of California, and agree to the presence here and to the participation in the depositions of Calavo's attorney, Mr. William A. Norris.

Mr. Ferguson: I request that the Notary Public attach to Mr. Biggar's deposition, when completed, the subpoena pursuant to which Mr. Biggar appears here this morning.

Deposition of David M. Biggar

David M. Biggar, a witness on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Please state your name.

[fol. 4] A. David M. Biggar.

Q. Will you tell us where you live, Mr. Biggar?

A. I live in Homestead, Florida.

Q. What is your occupation?

A. Manager of Avocado Administrative Committee, an organization established by the Secretary of Agriculture of the United States to administer the provisions of Marketing Order 969, regulating the handling of avocados grown in South Florida.

Q. Is that Marketing Agreement number 121?

A. That is the agreement number, yes.

Q. And the order, in shortened form, is 69?

A. 969, or, in the shortened form, 69.

Q. Where is your office?

A. 1102 North Krome Avenue, Homestead, Florida.

Q. Since when have you been manager of the Avocado Administrative Committee of South Florida?

A. Since July, 1954; since the inception of the Marketing Agreement and Order.

Q. What are your duties as manager of Avocado Administrative Committee?

A. My duties are administrative, arranging for meetings and conducting the usual office functions of an office manager, as well as carrying out other administrative duties.

Q. Do you keep all of the Committee's records?

A. Yes, I keep the records of the Committee.

[fol. 5] Q. Does that include the preparation of statistical data deemed of interest to the growers and handlers of avocados who operate under the Federal Marketing Agreement?

A. In the course of my duties and functions, I prepare statistical releases for the industry and am required at the end of each year to issue a report to the Secretary and to all interested growers concerning the activities of the Committee for the current season.

Q. So that you have issued by this time many annual reports?

A. We have issued three annual reports as of this time; one for each season, 1954-55, 1955-56 and 1956-57. Our current fiscal year ends March 31st, and we will issue the fourth report subsequent to that date.

Q. Does that define the season; in other words, do you mean by "season", your fiscal year?

A. It so happens that our fiscal year coincides with our season.

Q. It extends from April 1 of one year to March of the following year?

A. Our fiscal year extends from April 1 through March 31st. Our actual shipping season starts somewhat later and terminates as a rule somewhat later.

Q. Before you became associated with the Avocado Administrative Committee in 1954, had you been a student to some extent in the field of agriculture?

A. Quite.

[fol. 6] Q. Go ahead and tell us about that.

A. I received my Master of Agriculture Degree at the University of Florida in June, 1954. I specialized in the field of agricultural marketing for the purpose of that degree, and took my Bachelor's Degree in Business Administration, with a major in the field of marketing also.

Q. Is it one of your duties as Committee manager to issue licenses to handlers of avocados who meet the requirements of the Marketing Agreement?

A. It is.

Q. I show you two documents entitled "Registered Avocado Handler", to be marked plaintiffs' exhibits 1 and 2 for identification, and ask you if these are the documents which you prepared and issued?

Mr. Fourt: May I see them?

Mr. Ferguson: Yes. Let me have them marked first.

The Witness: They are.

By Mr. Ferguson:

Q. What are they?

A. They are certificates of registration showing that the handlers, Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., have registered with the Avocado Administrative Committee pursuant to the requirements of the Marketing Agreement and Order having to do with the handling of avocados grown in South Florida.

Q. For what period are these registrations effective?

[fol. 7] A. These registrations are effective for the 1957-58 season, or from April 1, 1957 through March 31, 1958.

Q. Were identical licenses issued to the same handlers in prior years?

A. Identical registrations. Of course the form itself varied with the season, but most of these organizations were licensed or registered,—I prefer to use the word registered—for each of the seasons covered by the Federal Marketing Agreement and Order.

Q. That would be since June, 1954?

A. Correct.

Mr. Ferguson: Plaintiffs' exhibits 1 and 2 are offered in evidence, and I would like to have an understanding as to these documents or any other original documents that may be offered in evidence, that photostats may be substituted for the originals.

Mr. Fourt: The defendants, Knight, Jacobsen and Brown, have no objection to the substitution of photostats. However, Mr. Ferguson, we believe it is premature to offer them in evidence at this time. Wouldn't it be better to just have them marked for identification?

Mr. Ferguson: They are now marked for identification. The offer is made to indicate that the interrogation will be followed by an offer of the documents in evidence.

Mr. Fourt: However, we are not stipulating that they may be admitted in evidence.

[fol. 8] Mr. Ferguson: No. I am not asking you to stipulate to their admission. We will leave that for a ruling of the Court. With that clarification, Mr. Fourt, I am ask-

ing only that there be an agreement that the photostats may be offered in lieu of the originals.

Mr. Fourt: It is so stipulated.

Mr. Norris: It is so stipulated by Calavo Growers of California, so long as it is understood that there is no agreement that they are to be admitted in evidence.

Mr. Fourt: Perhaps we can reduce the confusion here if Jacobsen, Brown and Knight are referred to as defendants, and Calavo be referred to as intervener.

Mr. Norris: I will just refer to my client as Calavo Growers of California, as distinguished from any parties.

By Mr. Ferguson:

Q. Mr. Biggar, since 1954 has all of your time been devoted to the problems of the Avocado Industry in Florida in relation to the functioning of the Avocado Administrative Committee?

A. No. I am jointly employed by two Committees, the Avocado Administrative Committee, who were my sole employers for 1954-1955 season. Since 1955-56, I have been employed jointly by the Lime Administrative Committee, a parallel organization to the Avocado Administrative Committee.

Q. What area is embraced in the Federal Marketing Agreement, number 121, or Marketing Order number 69 of [fol. 9] the United States Secretary of Agriculture?

A. Marketing Order 969, and the accompanying Marketing Agreement, as amended, now encompasses the counties of Pinellas, Hillsborough, Polk, Lake, Orange and Brevard, and all counties situated south of a line created by the boundaries of these counties and located south of these counties in the State of Florida.

Q. Does this include the entire area of Florida in which avocados are customarily grown?

A. Yes.

Q. Is there considerable backyard or non-commercial and commercial growing of avocados in Florida?

A. There is considerable commercial and non-commercial growing of avocados in South Florida, yes.

Q. Approximately what is the acreage of commercial production of avocados in Florida?

A. I have been told that the acreage is approximately eleven thousand acres. I have never had cause to question the figure or to check the figure, personally.

Q. Is this in the main a central production area?

A. The bulk of the production, and we estimate this to be approximately ninety percent; in other words, we estimate that the production in Dade County, Florida is ninety percent of the total production.

Mr. Norris: It is understood, is it not, that all objections [fol. 10] as to the admissibility of any of this testimony are reserved for trial, and if we can object on the ground of hearsay at that time we will not necessarily make objections at this time.

By Mr. Ferguson:

Q. Mr. Biggar, you have already mentioned the annual reports of the Avocado Administrative Committee which you have prepared. Is there included in the first annual report for the 1954-55 season a summary of the regulations made by the Secretary of Agriculture, fixing the permissible shipping dates for the various varieties of avocados handled in South Florida?

A. With your permission, Mr. Ferguson, I will refresh my memory on that.

Q. Just go ahead and look at it. Do you have copies?

A. Yes, I have copies of each of these. There is comment on the regulations, but not in a summary form, however, in this particular publication for 1954-1955 season.

Q. Not a schedule of dates?

A. No, sir.

Q. Does the Avocado Administrative Committee receive a copy of each order made by the Secretary of Agriculture under the Marketing Agreement?

A. It does.

Q. Do you have with you at this hearing a complete file of these orders?

A. I do.

[fol. 11] Q. Turning now to the 1955-56 annual report, does this include a reproduction of the schedule of permissible shipping dates for avocados in the 1955-56 season?

A. This schedule makes reference to Avocado Orders numbers 6, 8, 10 and 11, but does not reproduce those orders.

Q. It contains no summarized schedule of shipping dates?

A. It does not.

Q. I direct your attention to pages 16 and 17 of this report entitled "SUMMARY OF AVOCADO SHIPMENTS BY VARIETIES AND BY WEEKS—1955-56 SEASON". Did you prepare this summary?

A. I did.

Q. From what source of information?

A. This information was compiled from copies of the Federal-State Inspection Certificates issued by the United States Department of Agriculture in cooperation with the Florida State Department of Agriculture.

Q. Does the Avocado Administrative Committee receive copies of all inspection certificates?

A. We do.

Q. Issued by the Inspection Service?

A. Yes. May I qualify that?

Q. Yes.

A. I mean pertaining to avocados.

Q. I meant, of course, Mr. Biggar, pertaining to avocados.

A. That is right.

[fol. 12] Mr. Ferguson: Will the reporter mark this document as plaintiffs' exhibit 3 for identification?

By Mr. Ferguson:

Q. Mr. Biggar, I now show you a document marked plaintiffs' exhibit 3 for identification. Is this the type of inspection certificate to which you referred in your last answer?

A. It is.

Q. Does the Committee receive duplicate copies of all such certificates issued by the Federal-State Inspection Service of Florida?

A. Yes, affecting avocados.

Q. This particular certificate is not your file copy, is it?

A. The copy that we received is at present and it has been in the past a green copy of a multiple system.

Q. What color is this one?

A. This one is yellow.

Q. Issued to whom?

A. I am not clear on this. It is one of the copies that we do not receive.

Q. Incidentally, Mr. Biggar, in this certificate, under REMARKS, appear some abbreviations. Will you be good enough to explain those to us?

A. Under REMARKS on this particular certificate, being certificate number B-66158, is the following: "Meets [fol. 13] Florida AAC No. 2 Grade MSO." The term "AAC No. 2 Grade", refers to the Avocado Administrative Committee number 2 grade, as approved by the Secretary of Agriculture. With your permission I will look in my notes here and give you the docket number on that. The "AAC No. 2 Grade" refers to Avocado Administrative Committee Rules and Regulations, Grade Standards, as amended, as reprinted from the Federal Register of April 13, 1956.

Q. I was going to ask you about that at a later point. That explains that.

A. This "AAC No. 2 Grade" contained within that is a grade designation of this document that I referred to.

Q. You mean the number 2 grade stated in the certificate?

A. The number 2 grade under REMARKS—I will read it, "Meets Florida AAC No. 2 Grade"—that is a grade designation within the document referred to before. The "MSO" is a short abbreviation for the terminology "Meets Secretary's Order". That is a terminology used on all certificates to indicate that the fruit described in the certificate has met the provisions of the Federal Marketing Order by the Secretary of Agriculture.

Q. Now, Mr. Biggar, coming back to pages 16 and 17 of the 1955-56 annual report, is this summary of avocado shipments by varieties and weeks, comprising pages 16 and 17 of the Committee's annual report, true and correct?

A. Substantially so, yes.

Q. Now, instead of using the book, Mr. Biggar, I will ask [fol. 14] you if you have other mimeograph—

Mr. Fourt: We have no objection to the book being used.

Mr. Ferguson: I don't want to further encumber the record. If there is anything in the report you want, in addition to these two pages, a prior agreement to admission, all right; however, at the moment I will ask that these two pages be marked plaintiffs' exhibit 4 for identification.

Mr. Fourt: That is agreeable.

Mr. Ferguson: Plaintiffs' exhibit 4 will be offered in evidence. It is marked for indentification only now, and that is all I can do at this time, until the Court rules.

Mr. Fourt: Since I want to be very careful about this record, I desire that it be understood that we are not stipulating to it being admitted in evidence.

Mr. Ferguson: No, but it might guide your cross examination of the witness.

By Mr. Ferguson:

Q. Turning now to page 19 of this 1955-56 annual report, entitled "Composite Supply of Avocados, 1955-56 Season, By Points of Origin",—did you prepare this tabulation?

A. Yes.

Q. From what source?

A. As footnoted on this page, in the case of California, this was from "Estimated from monthly production data" supplied by Calavo Growers of California at my request. Under suggestions made by Calavo Growers of California [fol. 15] concerning distribution, and in some instances—I don't recall the exact period, from estimates made by Calavo Growers of California on periods not yet completed when they supplied the material.

On the Florida information, that was taken or compiled from certificates of inspection received from the Federal Inspection Service.

The Cuban information, as footnoted, was from unpublished records of United States Department of Agriculture Inspection Service, which we received in letter form from the Agriculture Marketing Service in Washington, and they in turn compiled the information from inspection certifi-

cates issued covering shipments from Cuba to the United States mainland.

Q. As to Florida, does the Committee receive reports from the handlers of avocados under the Marketing Agreement, as to the quantity handled, from time to time?

A. Mr. Ferguson, I call your attention again to the fact that this is a 1955-56 annual report. At that time we didn't receive such reports. The information contained on the certificate at that time indicated varieties, and the entire information was taken from the certificates at that time. Now subsequent to that "Variety" has been omitted from the certificate, and we receive a certificate now showing total quantities, and a report from handlers showing varieties and total quantities.

Q. How regularly are these reports received?

A. These reports are received weekly, but this particular [fol. 16] annual report which we are discussing at this moment, Mr. Ferguson, does not include any weekly reports from handlers. It is compiled in its entirety from certificates of inspection.

Q. Now, Mr. Biggar, with that explanation of the material used, is this tabulation a true and correct summary of the data?

A. For Florida?

Q. No; in its entirety.

A. It is and, as I explained earlier, the source.

Q. And you refer now to the tabulation in its entirety?

A. Yes.

Mr. Ferguson: I will now ask to have this mimeograph copy of page 19 marked for identification as plaintiffs' exhibit 5.

Mr. Fourt: For identification.

Mr. Ferguson: Yes. Plaintiffs' exhibit 5 will be offered in evidence, and I call counsel's attention to the fact that the results of this tabulation are alleged in the Complaint and admitted in the Answer, namely, in paragraph 15 of the Complaint, and page 2, lines 20 to 26 of the Answer.

Mr. Fourt: The defendants are not stipulating that this is to be admitted in evidence, Mr. Ferguson.

Mr. Ferguson: That is right. This holds all the way

through, Mr. Fourt, so I won't burden you to repeat it each time.

Mr. Fourt: Thank you.

By Mr. Ferguson:

Q. Mr. Biggar, I now call your attention to the Com-[fol. 17] mittee report for the 1956-57 season, particularly to pages 7 and 8 thereof, entitled "Maturity Regulations". Did you prepare this summary?

A. I did.

Q. Is this a true and correct summary of the orders made by the Secretary of Agriculture with respect to the Maturity Regulations having to do with the shipping of avocados under the Marketing Agreement in the 1956-57 season?

A. It is.

Mr. Ferguson: Will the reporter please mark another copy of these two pages, 7 and 8, as plaintiffs' exhibit 6 for identification?

(Said pages 7 and 8 marked plaintiffs' exhibit 6 for identification.)

Mr. Ferguson: Plaintiffs' exhibit 6 for identification will be offered in evidence.

By Mr. Ferguson:

Q. Mr. Biggar, pages 18 and 19 of this report appear to be a summary of avocados handled by varieties and by weeks in the 1956-57 season. Did you prepare this summary?

A. I did.

Q. From the records of the Avocado Administrative Committee?

A. On page 19 it is footnoted that "Lines 1-13 show net quantities shipped, based on 3 flats equal 1 multilayer, 4 flats equal one bushel.

"Lines 14-40 show approximate gross quantities handled [fol. 18] (including gradeout) as reported weekly by handlers."

Lines 1 to 13 were taken directly from the certificate which at that time showed varieties.

Q. These are the inspection certificates?

A. That is correct, the Federal-State Inspection Certificates, as previously entered as an exhibit here.

As stated, lines 14 through 40 were taken from the handlers' weekly reports as footnoted, showing approximate gross quantities handled by varieties.

At the period ending September 15, 1956, the policy of the Federal-State Inspection Service was to change so as to no longer require that the variety be shown on the actual inspection certificate. The variety is taken into cognizance by the inspector and noted on his worksheet, and the term "MSO" or "Meets Secretary's Order" is placed at the bottom of the certificate to indicate that this variety has been taken into cognizance, but it is no longer shown on the face of the certificate of inspection.

Q. With the explanation you have just made, Mr. Biggar, is this summary a true and correct compilation from the figures shown in the Committee's records?

A. Yes.

Mr. Ferguson: Will the reporter mark this document, consisting of two pages, as plaintiffs' exhibit 7 for identification?

By Mr. Ferguson:

Q. At page 21 of this 1956-57 report, there is a tabulation [fol. 19] entitled "Composite Supply of Avocados By Season and Points of Origin". Is that of the same nature as a like summary in the prior annual report?

A. It is. I might call your attention to the footnotes—

Q. I was going to ask you the source of the information. The footnote there reads "1955-56 Florida quantities revised to reflect standard base of 4 flats equal one bushel; one multilayer equals 3 flats."

A. By way of explanation, in the earlier report submitted here in evidence, Mr. Ferguson, the bushels were computed on the basis of weight, a weight of fifteen pounds per flat and forty pounds per multilayer; that was the standard unit of measure there computed. This unit of

measure was changed during the 1956-57 season, and the bushel, for the purpose of our record keeping, was computed on a volume basis, with each flat assigned a value of one-quarter bushel, and each multilayer a total value of three-fourths of a bushel, for accounting purposes. Now, to bring the figures into proper perspective, the 1955-56 figures as pertain to Florida were revised and recomputed, and there will be discrepancy between the figures shown in the 1955-56 portion of page 21 of the 1956-57 annual report, with those shown for the 1955-56 report.

Q. Due to mathematical adjustments?

A. Yes, due to mathematical adjustments.

Q. Referring to the 1956-57 summary contained on this [fol. 20] page, is that true and correct?

A. It is true and correct, taking into consideration the source of information in each instance.

Q. And as to that, Mr. Biggar, do you wish to add to your footnotes appearing on the page itself?

A. No; I believe that will stand.

Mr. Ferguson: Will the reporter please mark this document as plaintiffs' exhibit 8 for identification?

(Document so marked by reporter.)

Mr. Ferguson: The document now marked plaintiffs' exhibit 8 for identification will be offered in evidence as plaintiffs' exhibit 8.

By Mr. Ferguson:

Q. Mr. Biggar, I now show you a document entitled "Avocado Shipping Dates, 1957-58 Season," which I will ask the reporter to mark as plaintiffs' exhibit 9 for identification. Did you prepare this document?

A. I did.

Q. Is this a true summary of orders made by the Secretary of Agriculture respecting the shipping dates for Florida avocados in the 1957-58 season?

A. It is.

Mr. Ferguson: I advise counsel that I shall offer this page as plaintiffs' exhibit 9, which, for convenience, is the

same as exhibit "B" attached to the Complaint, and which is admitted in the Answer.

[fol. 21] By Mr. Ferguson:

Q. Mr. Biggar, has the Secretary of Agriculture issued any additional orders as to shipping dates for the avocados covered by the Federal Marketing Agreement since October 8, 1957?

A. Once again, Mr. Ferguson, I prefer to refresh my memory. I have a copy of the order. Order 14 was actually issued on October 10th, to become effective 12:01 A.M., Eastern Standard Time, October 14, 1957. These avocado shipping dates issued October 8th anticipated the Secretary's order, and encompasses the order issued effective October 14th.

Q. Has there been anything later?

A. No further shipping dates changed since that time.

Q. It is alleged in the plaintiffs' Complaint in this case, paragraph 11, and admitted in the Answer of the defendants, that grade standards of avocados handled under the Marketing Agreement 121, were by order of the Secretary of Agriculture effective May 21, 1955, as amended June 13, 1956. You have already made a statement to that effect, and the grade standards of June 13, 1956 are attached to the Complaint as exhibit "C". My question is has there been any amendment or amendments of the grade order since June 13, 1956?

A. In order to clarify the situation as regards grade standards as compared to grade order, there has been no change as to standards, but there has been a change in the order. The Secretary of Agriculture issued amendment 7, [fol. 22] Avocado Order 14, on November 14, 1957, to become effective 12:01 A.M., Eastern Standard Time, November 18, 1957, which changed the grade requirements from a minimum of an AAC number 2 grade as set forth in the April 13th standards.

Q. Is that April 13, 1956?

A. Yes, April 13, 1956.

Q. I think I must have said "June". It is April, is it?

A. Yes.

Q. Go ahead.

A. —to a number 2 grade, containing not less than twenty-five percent number 1 quality.

Q. Was that order preceded by a recommendation of the Avocado Administrative Committee?

A. It was.

Q. What is the date of that recommendation?

A. Since again, Mr. Ferguson, this is a matter of date, I will have to refer to the minutes. That recommendation was made at the meeting of November 12, 1957.

Q. Let's see if the record is clear about these grade standards. You stated that they were established by an order of April 13, 1956, the order effective on that date?

A. Correct.

Q. And that these grade standards still stand?

A. Yes, they still stand.

Q. What has been the change?

[fol. 23] A. The change was to increase the quality or to increase the quality requirement from a straight AAC number 2 grade as a minimum to an AAC number 2 grade containing not less than twenty-five percent number 1 quality.

Q. Does that mean that since April, 1956 the minimum quality requirement for the shipping of Florida avocados is grade 2?

A. With certain periods in which we had no regulations. There are two distinct documents; one is a regulation and one is the standard. The standard has not been changed since 1956. The regulations have been changed from time to time.

Q. We have the grade standards of April 13, 1956. Since then, as I get it, there have been regulations prohibiting the shipment of avocados of certain grades?

A. Yes.

Q. Now, Mr. Biggar, will you tell us again what are these regulations and when they became effective?

A. Again I will have to refer to the orders themselves.

Q. If you will.

A. Referring to Avocado Order 14, issued May 21, 1957, to become effective 12:01 A.M., Eastern Standard Time, May 26, 1957, which reads in part:

"During the period beginning at 12:01 A.M., Eastern Standard Time, June 3, 1957, and ending at 12:01 A.M., Eastern Standard Time, April 30, 1958, no handler shall [fol. 24] handle any avocados grown in South Florida unless such avocados grade at least number 2 grade and meet the requirements of standard pack."

The first amendment that affected this particular factor, that is, the factor of grade, was amendment 7, which I have previously referred to, dated November 14, 1957, to become effective 12:01 Eastern Standard Time, November 18, 1957, which reads in part:

"During the period beginning at 12:01 A.M., Eastern Standard Time, November 18, 1957, and ending 12:01 A.M., Eastern Standard Time, April 30, 1958, no handler shall handle any container of avocados grown in South Florida unless the avocados in such container grade not less than twenty-five percent number 1 grade, and the remainder at least number 2 grade."

Then it goes on to say:

"Provided that not to exceed five percent of the containers in a lot may contain avocados which fail to meet such requirements if the entire lot is within the tolerance and meet the requirements of the standard pack."

Then it goes on to say:

"The grade terminology shall have the same meaning as set forth in sub-section 969.130 of the supplementing [fol. 25] rules and regulations," and then this is a description of the April 13th standards.

Q. Does this last amendment of the grade standard regulations have a time limitation?

A. It is effective until April 30, 1958.

Q. And that is the grade standard now in effect?

A. Yes. Of course all regulations are on a year-to-year basis, in order to permit the incoming Committee to make its recommendations to the Secretary of Agriculture.

Q. So that the present regulation is a minimum requirement of grade 2 of which, however, at least twenty-five percent must be grade 1?

A. Yes, that is correct.

Q. Mr. Biggar, during the current year have you prepared and issued to the growers and handlers a series of weekly summaries of avocado shipments from the South Florida production area?

A. I have.

Q. Do you have them with you?

A. Yes, sir.

Q. Have there been twenty-nine such weekly reports?

A. I numbered them consecutively by weeks and my last report is number 29.

Q. Which means one report per week since then?

A. The first report, report number 1, is dated July 1, 1957, and it covers the period April 1 through June 15, [fol. 26] June 16 through June 22nd and June 23rd through June 29th, for the 1957-58 season, with comparative information for the period April 1 through June 30 for the 1956-57 season.

Mr. Ferguson: Will you, Mr. Reporter, mark these five pages as plaintiffs' exhibit 10 for identification?

By Mr. Ferguson:

Q. Mr. Biggar, these five pages marked now plaintiffs' exhibit 10 for identification are five of the twenty-nine reports, are they not?

A. They are.

Q. Were they selected as dates nearest the end of each month indicated?

A. They were for dates of issue.

Q. You mean the dates when you issued these statements; is that right?

A. That is right.

Q. Did you prepare these summaries of avocado shipments yourself from records of the Avocado Administrative Committee?

A. Yes. These were taken entirely from the certificates of inspection issued by the Federal-State Inspection Service.

Q. On the copies here you list "Units for Florida Destina-

tions", and you have a footnote there. Will you explain that footnote?

A. Close examination of the exhibit previously introduced of a Federal-State Inspection Certificate affecting avocados, will show the destination is not included. There are [fol. 27] certain avocados transported by common carrier which appear on the surface to be going out of the state but which in fact may in small quantities be delivered within the state. For instance, a "lot" may consist of sixteen hundred flats bound for a terminal market, and a small portion of this may be dropped in a Florida market en route to other destinations. The footnote there does not include "drop lots". There are other lots which we can determine are destined for Florida markets which could have been on their way out of the state from such terminals as Tampa, Sanford or Jacksonville to out-of-state destinations. The two quantities probably offset one another to a large extent.

Q. In your opinion is this tabulation substantially correct?

A. In my opinion this tabulation is substantially correct.

Mr. Ferguson: These five pages marked plaintiffs' exhibit 10 for identification will be offered in evidence.

By Mr. Ferguson:

Q. Is this the first season during which you have prepared such weekly summaries?

A. Yes, this is the first season that the attempt has been made.

Q. Has the 1957-58 shipping season ended?

A. No.

Q. Can you estimate how much longer it will continue?

A. This is the 21st day of January and I would estimate that the season will be virtually over—there is no way of determining exactly—by February 15th. The bulk of the [fol. 28] volume will have moved by then, although we will still have some shipments after that date.

Q. Look at your last weekly statement dated January 13, 1958, which contains totals to January 11, 1958. Can you make a reasonably accurate estimate of the probable total for the entire 1957-58 season?

A. Within a range, yes. I wouldn't want to pin it down to the final bushel, but there will be between four hundred fifty thousand and five hundred thousand bushels in total.

Mr. Ferguson: Mark this page as plaintiffs' exhibit 11 for identification.

By Mr. Ferguson:

Q. Mr. Biggar, did you prepare the statement contained on the page marked plaintiffs' exhibit 11 for identification?

A. I did.

Q. What is the difference, if any, between the figures as stated in this exhibit 11 and the total figures stated in the January 13, 1958 page of exhibit 10?

A. The quantities have been converted to bushels.

Q. Otherwise they are the same?

A. Yes, rather than the units as stated in the form you previously mentioned.

Q. Units meaning what?

A. A unit means one-fourth of a bushel equivalent, whereas the term "bushel" has been used to indicate four flats or [fol. 29] four lugs.

Q. Was this done merely to make this conform with the upper part of the pages comprising plaintiffs' exhibit 10 in which the quantities are stated in bushels?

A. That is correct.

Mr. Ferguson: The plaintiffs will offer plaintiffs' exhibit 11 in evidence.

By Mr. Ferguson:

Q. Mr. Biggar, I take it that you are acquainted with Dr. Roy W. Harkness of the Sub-Tropical Experiment Station in Homestead of the University of Florida?

A. I am.

Q. Do you know whether tests of the oil content of avocados are made at this Experiment Station upon application by growers and handlers of avocados in the South Florida Production Area?

A. It has been their practice and it is their practice to make such tests.

Q. Have you examined his records as to these tests?

A. I have.

Q. Were you permitted by Dr. Harkness to copy a record of such tests made upon application of Florida Lime and Avocado Growers, Inc., and also of the tests made upon application of Mr. Kendall of South Florida Growers Association, Inc.?

A. I was informed by Dr. Reuhle, the Director of the Experiment Station, and the Director in charge of the Sub-Tropical Experiment Station, that these records are public [fol. 30] records and are available to all concerned, and I was permitted by Dr. Harkness to make extracts from these records for a four-year period for each of the two plaintiffs.

Mr. Ferguson: May these four pages entitled "Oil Content Tests of Florida Avocados made at Experiment Station, Homestead, Florida, at Request of Florida Lime & Avocado Growers, Inc." be marked plaintiffs' exhibit 12 for identification, and the four pages entitled "Oil Content Tests of Florida Avocados made at Experiment Station, Homestead, Florida, at Request of South Florida Growers Association, Inc." be marked plaintiffs' exhibit 13 for identification?

By Mr. Ferguson:

Q. Did you personally make a copy of the Oil Tests as recorded at the Experiment Station?

A. I did.

Q. Are the entries in these two exhibits, plaintiffs' exhibit 13 and plaintiffs' exhibit 12 for identification, a correct recordation of what appears in the records at the Experiment Station?

A. They are.

Mr. Ferguson: I wish to state for the record that these lists of Oil Tests will not be offered in evidence until Dr. Harkness testifies as a witness in this case, but any prior reference to the contents of these exhibits will be subject to the testimony of Dr. Harkness.

By Mr. Ferguson:

Q. Mr. Biggar, looking further at these compilations, [fol. 31] plaintiffs' exhibits 12 and 13 for identification, there is an addendum at the bottom of each page, is there not, entitled "Shipping Dates Authorized By Regulations of U. S. Secretary of Agriculture Under South Florida Federal Marketing Agreement"?

From what source did you obtain the data in these footnotes or addenda?

A. The information shown at the bottom of each page under the heading "Shipping Dates Authorized By Regulations of U. S. Secretary of Agriculture", were extracted from the orders issued by the Secretary of Agriculture for each of the indicated seasons as indicated at the top of the sheet, and is covered by the Oil Tests for these particular seasons.

Q. These shipping dates are all included in exhibits heretofore identified, are they not?

A. No, not in all instances. That is true for the 1956-57 season.

Q. And 1957-58?

A. And 1957-58 through the exhibit 9.

Q. Where they go further back, did you take them from the Secretary's Orders?

A. Yes, I took them from the Secretary's Orders.

Q. And it is limited, is it not, to the varieties of which tests were made?

A. Limited to the pertinent varieties shown in the tests, [fol. 32] yes.

Mr. Ferguson: You may cross examine.

Mr. Fourt: I wonder if we might be able to have a recess at this time in order that I might be able to have access to the public file to which Mr. Biggar made reference?

Mr. Ferguson: Yes.

(Adjournment taken to 1:00 P.M. of the same day.)

Afternoon Session

1:00 P.M., January 21, 1958

Deposition resumed pursuant to adjournment.

Appearances: Same as heretofore noted.

DAVID M. BIGGAR resumed the stand and was examined and testified further as follows:

Cross examination.

By Mr. Fourt:

Q. Mr. Biggar, you mentioned and listed several counties through the State of Florida which constitute the northern limits of your marketing area; is that correct?

A. Yes.

Q. Is there a limited production of avocados in the State of Florida north of those counties?

A. I don't know.

Q. I show you plaintiffs' exhibit 3 for identification and ask you if you know the meaning of the item "Lot 59 Hse. 20"?

[fol. 33] A. Yes, I do.

Q. What are those designations?

A. This particular certificate number B-66158 represents 1874 quarter bushel F.B. boxes, which contains the markings as designated here, "Lot 59, House 20". The lot number 59 is a number issued to designate the week in which the fruit was picked. The house number is a number assigned by the Inspection Service to each house to identify the house. That is the means of reconciling these particular 1874 containers with this particular certificate, as a matter of identification, if you will.

Q. Were you personally present when this inspection certificate was made?

A. No.

Q. Do you know of your own knowledge whether the figure "1874 packages" constituted the entire lot of avocados shipped on that trailer described in plaintiffs' exhibit 3 for identification?

A. No, I do not. I was asked merely to identify that document as a form used by the Federal-State Inspection Service for the certification of avocados. I know nothing of that particular lot as such. Perhaps I could develop some information on that.

Mr. Ferguson: I can tell counsel now that there will be some testimony about that from the shippers.

By Mr. Fourt:

Q. Do you have any personal knowledge regarding the stamped impression which appears in the right center of [fol. 34] plaintiffs' exhibit 3 for identification which reads "Passed"?

A. I have observed a stamp similar to that placed upon this type of certificate, the yellow copy, at the State Road Guard Stations located throughout the northern portion of the state, to indicate that that shipment had cleared through that station, and that such was not available for reissue to pass a second lot.

Q. But you have no personal knowledge as to this particular stamp?

A. I have not been requested to search our records for information concerning this particular lot.

Q. Then it is correct that as to the stamp identification "Passed", you have no personal knowledge of that?

A. No, sir.

Q. Do you have any personal knowledge regarding the stamped impression "Inspected and Released" in the middle of plaintiffs' exhibit 3 for identification?

A. I have no knowledge whatsoever of that stamp.

Q. What is the governmental agency that makes inspections of avocados which are regulated by the Avocado Marketing Order?

A. The agency's name appears at the top of the inspection certificate. The exact wording of the title, I don't know. If I may be permitted to refresh my memory with that exhibit, I can read it into the record.

Q. Please do so.

[fol. 35] A. "U. S. Department of Agriculture Agricul

tural Marketing Service—Florida Department of Agriculture—Citrus and Vegetable Inspection Division".

That title describes the two organizations which cooperate in conducting these inspections.

Q. Mr. Biggar, a moment ago you were just reading from the top of plaintiffs' exhibit 3 for identification; is that right?

A. That is right.

Q. Do you have any personal knowledge as to who pays the salary of the inspector here at this agency, as to whether it is the Federal or State Government?

A. Anything I would say on that would be hearsay, because I have had no reason to check that closely.

Q. Does the Inspection Service which you described a moment ago come under the jurisdiction of the Avocado Administrative Committee?

A. No.

Q. Do you have any personal control over the inspection of avocados as regulated by the Agricultural Marketing Order?

A. No, sir.

Q. Plaintiffs' exhibit 5 for identification denotes that there is some Cuban production. Is that Cuban production composed of several varieties of avocados?

A. There are several varieties and a miscellaneous category referred to as seedlings.

[fol. 36] Q. In which category does the majority of the Cuban production fall?

A. In the category of seedlings.

Q. Do you have any personal knowledge as to why the designation of variety was removed from the grade certificate by the Inspection Service?

A. They considered it to be superfluous.

Q. I show you plaintiffs' exhibit 4 for identification and ask you if you have any personal knowledge regarding the origin of those statistics?

A. This is a summary of avocado shipments by varieties and weeks for the 1955-56 season. The origin of this information for this particular season as described in this exhibit was the inspection certificates as issued by the joint

Federal-State Inspection Service. At that time the certificates bore the variety designation.

Q. However, you have no personal knowledge regarding the observation of that fruit covered in plaintiffs' exhibit 4 for identification?

A. That question is not clear.

Q. In plaintiffs' exhibit 4 for identification, for the week ending July 9th, it indicates that in the week ending July 9th there were 1991 box equivalents of fruit shipped. Did you personally observe that fruit and count it?

A. The answer obviously is no.

[fol. 37] Q. And isn't that true with all of the statistics listed on plaintiffs' exhibit 4 for identification?

A. I relied entirely upon the documents presented to me by the Federal-State Inspection Service.

Q. And you have no personal knowledge as to the origin of these certificates other than as you have stated?

A. That is right.

Q. I now show you plaintiffs' exhibit 7 for identification and ask you if you personally observed the fruit and counted the boxes or bushels which are included in that year's tabulation?

A. As indicated in a footnote on that tabulation, I relied upon lines 1 through 13 of the documents submitted to me by the Federal-State Inspection Service, and upon lines 13 to 40 of the reports supplied to me by the shippers of the fruit. I did not personally count the fruit.

Q. I show you plaintiffs' exhibit 8 for identification and ask if you personally observed the fruit and counted the containers which are covered in that tabulation?

A. There are tabulations on this exhibit 8 for the State of California, the State of Florida and for the Nation of Cuba. I did not count, as previously testified, the fruit with respect to Florida, and had, of course, no access to the fruit having to do with California or Cuba. The answer is that I have not personally counted the fruit.

Q. Would that answer be the same as to the figures given [fol. 38] for bushels shipped during certain dates as given on plaintiffs' exhibit 11 for identification?

A. It would.

Q. I now show you plaintiffs' exhibit 12 for identification and ask you at whose request did you go to the Sub-Tropical Experiment Station of the University of Florida to obtain this information?

A. I was requested to provide this information or this type of information by Mr. Fred Piowaty and Mr. Harold Kendall, and by Mr. Ferguson.

Q. Were you authorized to do so by a resolution of the Avocado Administrative Committee?

A. No, sir.

Q. Or by the Chairman of the Avocado Administrative Committee?

A. No, sir.

Q. You are the manager of the Avocado Administrative Committee, are you not?

A. That is right.

Q. And you were not requested to do this by the Chairman of the Committee?

A. No.

Q. Was this prepared in the course of your employment as manager of the Avocado Administrative Committee or as a personal favor to the persons mentioned?

[fol. 39] A. This particular extract was, as I considered it, a personal favor.

Q. Did you make the personal arrangements for mimeographing it?

A. I couldn't say I made personal arrangements in reproducing the specific information for the Committee.

Q. Referring now to plaintiffs' exhibit 12 for identification, was that reproduced by the offices of the Avocado Administrative Committee?

A. Yes.

Q. Is that also true of plaintiffs' exhibit 13 which I now hand you?

A. That is correct.

Q. Do you recall the approximate date when Mr. Piowaty, Mr. Kendall and Mr. Ferguson or any of them requested you to prepare this exhibit?

A. No.

Q. Would it have been right around January 1st?

A. I think my original answer that I don't recall, sir.

would serve. I wouldn't want to venture a guess into the record of this nature.

Q. Where did you obtain the figures regarding the "geography"?

A. At the office of Dr. Roy Harkness at the Sub-Tropical Experiment Station of the University, Homestead, Florida, which is located on Waldin Drive, somewhat west of Redland Road.

[fol. 40] Q. Do you recall the approximate date that you visited this office?

A. Yes.

Q. When?

A. It was the latter part of last week, but I cannot recall the exact date, whether it was Thursday or Friday, however, I believe it was one of the two.

Q. Would it have been either Thursday or Friday, the 16th or 17th of January, 1958?

A. I just don't recollect. I can consult my office calendar and confirm it.

Q. Would it have been a day or two of those dates?

A. I will say that it was one day towards the last part of last week.

Q. How long prior to that date was the request made for you to prepare this information?

A. I don't recall.

Q. Would it have been more than a week?

A. I just don't recall.

Q. Were you compensated for doing this favor for these gentlemen?

A. In which way do you mean "compensated"?

Q. By the payment of money.

A. No.

Q. Do you have any personal knowledge as to who made [fol. 41] the request that this information be obtained or these tests made by the Sub-Tropical Experiment Station?

A. Only as shown on the information extracted from the records and reproduced.

Q. Other than that you have no personal knowledge?

A. No, not personal knowledge.

Q. With whom did you talk when the request was made to prepare plaintiffs' exhibits 12 and 13 for identification?

A. What do you mean?

Q. Well, did you talk with Mr. Piowaty and Mr. Kendall and Mr. Ferguson, or either one?

A. I talked to all three of the gentlemen at various times.

Q. Did they indicate to you the purpose for which they wanted the exhibit?

A. They indicated that it was a study of maturity.

Q. As a matter of fact, Mr. Biggar, didn't they indicate that they wanted to use it in a lawsuit pending in the Federal Court for the Northern District of California?

A. I don't recall the exact words.

Q. Well, at the time they made the request were you aware that there was such a lawsuit pending?

A. Yes.

Q. And did you understand that they were going to use this material as a part of the plaintiffs' case in that lawsuit?

A. I didn't know whether they would or not. I knew it [fol. 42] was possible.

Q. At the time the request was made did you know that Mr. Piowaty was an officer of the Florida Lime and Avocado Growers, Inc.?

A. No, I did not.

Q. At that time did you know that Mr. Kendall was an officer?

A. Let me qualify that statement. You mean did I have personal knowledge?

Q. Had you been informed that he was an officer?

A. Directly, indirectly or implied?

Q. Indirectly.

A. No.

Q. You had heard it?

A. I assumed that, but I wouldn't want to inject an assumption here.

Q. You don't know for a fact that he was, but you have heard it?

A. No. I don't know up to this very moment.

Q. At the time the request was made that you prepare these exhibits and obtain this information did you know

at least that Mr. Piowaty was an officer of the Florida Lime and Avocado Growers, Inc.?

A. At the time I had no occasion to recollect whether he was an officer of that or any other organization. I knew he [fol. 43] was connected with the firm.

Q. At the time the request was made were you aware that Mr. Kendall was an officer or at least connected with the South Florida Growers Association?

A. Yes.

Q. At the time Mr. Ferguson talked to you, were you aware that he was the attorney representing the Florida Lime and Avocado Growers, Inc.?

A. Yes, and others.

Q. And the South Florida Growers Association?

A. Yes.

Q. At the time the request was made, were you aware that it was the position of Florida Lime and Avocado Growers, Inc. and the South Florida Growers, Inc. that the California Oil Tests were invalid?

A. I have heard that contended from time to time by various persons.

Q. At the time the request was made were you aware that that was their contention?

A. Yes. I may have misled you somewhat, Mr. Fourt, in a statement I made previously.

Q. Please correct it.

A. I don't want any insinuation or anything of that nature to rest. I would like to call your attention to the Avocado Marketing Order number 969, summarizing avo- [fol. 44] cados grown in South Florida. Sub-paragraph (h) of 969.29, states that it is the duty of the Committee and of the Committee employees, according to my interpretation, to investigate the growing and maturity of vegetables and to assemble data in connection therewith. With that in mind, I did delve quite deeply into the subject.

Q. So far as you know, does the Avocado Administrative Committee consider itself a party to this litigation?

A. In no way whatsoever.

Q. Has the Committee or its Chairman given you any direction regarding your position in the litigation?

A. The question has not been raised by anyone. I have

cooperated with both sides, as you know, Mr. Fourt; I supplied you with quite considerable data also.

Q. With respect to the representatives of the industry, who are the members of the Avocado Administrative Committee?

A. The Committee is made up of nine members and nine alternate members. The members are drawn from two districts. District 1 contributes seven members and seven alternates; district 2 contributes two members and two alternates. The composition of district 1 embraces a member and alternate, plus four growers and three handlers. District 2 consists of one grower and one handler, as members and alternates.

Q. What is the geographical area covered by district 1?

A. District 2 constitutes all of the production area as defined earlier, less Dade County. District 1 consists of [fol. 45] Dade County.

Q. How are the operations of the Committee financed?

A. They are financed by an assessment placed against units of fruit shipped.

Q. Is it true that during the Committee's fiscal year ending March 31, 1957 that you received as Committee manager $3,750.00?

A. That is correct?

Q. And will you receive a similar amount for your services during the fiscal year ending March 31, 1958?

A. I was fortunate enough to receive a slight raise.

Q. What will be your salary this year?

A. $4,000.00.

Q. During the year ending March 31, 1957, there is an indication in the 1956-57 report that $326.38 was paid for maturity studies. To whom was that money paid?

A. That money was paid out, but I do not recall every entry now. However, I believe that part of that was paid for assistance in the form of a laboratory janitor to assist with the tests that were being conducted by the United States Department of Agriculture, and the purchase of fruit may or may not have been included in that.

Q. Where was that particular research project carried on?

A. In the Homestead area.

Q. At which laboratory would these operations have been [fol. 46] carried on?

A. The agency that conducted these tests moved out of the location they had with the County Agent, moving to some offices located in Coconut Grove. I don't recall the exact time of the move, but possibly these were conducted at 1102 North Krome Avenue, and part of them at the plaintiffs' production area. I don't recall the exact location of their offices at that time.

Q. What was the name of the agency that conducted them?

A. It is called the Maintenance and Improvement Section of the Agricultural Marketing Service, United States Department of Agriculture.

Q. Who is the immediate head of that particular organization?

A. By "immediate head" you mean—

Q. The man or scientist who is immediately in charge of the operation.

Mr. Ferguson: You mean for the State of Florida, Mr. Fourt?

By Mr. Fourt:

Q. Do you understand my question, Mr. Biggar?

A. No.

Q. Is this organization a Federal or State organization?

A. Federal.

Q. Who is the scientist in charge of the immediate station?

A. The immediate station at Homestead is a sub-station [fol. 47] of the Orlando station. The Orlando station—the work that has been done for our Committee, has been conducted by Dr. Paul L. Harding. I don't believe Dr. Harding is the head of the station in Orlando. I just don't know. I do know that he worked on the work we were interested in, and that he delegated part of his responsibility to Dr. Hatten in the sub-station. I believe he considers that Dr. Hatten is the senior scientist in his Miami sub-station.

Q. Would this be the station that is often referred to as being located at Chapman Field?

A. That is the name of the plant division of the Department of Agriculture, and it is commonly known in this area as Chapman Field.

Q. Who is the head of the research project over at Chapman Field?

A. I believe that is Dr. T. P. Hatten.

Q. Was it to him that this $326.38 was paid?

A. The money in that case would be to the assistant. We provided services, not money.

Q. To whom would the money have been paid?

A. I would have to search the records. I believe there were several people involved in that, because we didn't keep the same janitor at all times.

Q. Were these people working under and employed by Dr. Hatten?

[fol. 48] A. Let's say that they were paid to clean glass and things like that.

Q. Were they working under his supervision?

A. Yes, but I thought you said "employed by Dr. Hatten". There is a difference there, you know.

Mr. Fourt: Mr. Reporter, I hand you a document which purports to be the annual report of the Avocado Administrative Committee, 1954-55 season, and ask that it be marked as defendants' exhibit A for identification.

Q. Is it true, Mr. Biggar, that the Avocado Administrative Committee is a Federal Agency in the sense that it has been formed and acts pursuant to the authority of the Secretary of Agriculture of the United States Federal Government?

A. That is correct.

Q. And is it true that defendants' exhibit A for identification is an official Government publication?

A. I don't know. That thought has never occurred to me.

Q. What would you identify defendants' exhibit A for identification as?

A. It is an annual report of the Avocado Administrative Committee for the 1954-55 season.

Q. Were you manager of the Committee during the period of time covered by this report?

A. I was.

Q. Of your own knowledge you know that this exhibit, [fol. 49] as far as the Committee is concerned, is an official publication?

A. That is correct. Based on the minutes of the Committee, it is accepted as an official report.

Q. On page 7 of defendants' exhibit A for identification appears a comment with respect to the varieties Waldin, Trapp and Booth 8 varieties, that the maturity regulations were removed too early in the season. Do you recall what happened?

A. You want me to familiarize myself with that statement?

Q. Yes.

A. Where is that paragraph?

Q. It is the bottom paragraph. What happened with the varieties Waldin, Trapp and Booth 8 as they were marketed?

A. That is a very ambiguous question.

Q. Did you write that particular paragraph?

A. Yes.

Q. What did you mean by the statement that the "Maturity regulations were removed too early in the season"?

A. Just exactly that. As mentioned there, the control period wasn't extended over a sufficiently long enough period. In my opinion they made a mistake there that particular season, which was reflected in the following season.

Q. In that year then there was a considerable quantity of fruit of these varieties which reached the market in immature condition?

A. I would say it reached the market in undesirable [fol. 50] condition. There were a number of complicating factors that went into that, so it would be difficult to determine exactly what the cause was.

Q. Were you apprised of the condition of the fruit when it reached the market?

Mr. Ferguson: It is not proper cross examination. It doesn't relate to anything in the direct examination, and it doesn't test the credibility of the witness.

The Witness: I would say that in this particular instance I was informed that the fruit arrived in a discolored condition, partially due to a grade consideration and possibly

due to the fact that our maturity restrictions permitted it. As I mentioned before, this has been rectified in subsequent seasons and repetition has not been observed. So as to this exact statement, sir, we had no cause to go further into it.

By Mr. Fourt:

Q. Is it true that the statement is made here:

"To cite an example, during the week ending October 16th over twenty-four thousand bushels of Booth 8 avocados were shipped, many of which were not sufficiently mature or had been held under refrigeration so long that they arrived in the market in a badly discolored or soft condition"?

Did you know also that some of the fruit arrived in the market in an immature condition?

[fol. 51] A. Let me read just exactly what I did say. I said, "many of which were not sufficiently mature or had been held under refrigeration so long".

Q. As you recall at the present moment do you know whether you were informed as to the maturity of that fruit upon reaching the market?

A. No, only the condition.

Mr. Fourt: Mr. Reporter, I hand you a document which purports to be the annual report of the Avocado Administrative Committee for the 1955-56 marketing season, and ask you to mark it as defendants' exhibit B for identification.

By Mr. Fourt:

Q. I show you defendants' exhibit B for identification and ask you to identify that document?

A. This is the annual report of the Avocado Administrative Committee for the 1955-56 season.

Q. Is that the official report of the Committee for that season?

A. It is.

Mr. Fourt: Mr. Reporter, I hand you a document which purports to be the annual report of the Avocado Adminis-

trative Committee for the 1956-57 season, and ask that you mark it as defendants' exhibit C for identification.

By Mr. Fourt:

Q. I show you defendants' exhibit C for identification and ask you to identify it, if you will?

A. This is the annual report of the Avocado Administra- [fol. 52] tive Committee for the 1956-57 season.

Q. And is it true that this report is an official report of the Avocado Administrative Committee for that season?

A. Yes.

Q. I now want to direct your attention to defendants' exhibit B for identification, particularly to the bottom paragraph of page 12, and ask you to read the paragraph, starting with "A secondary short-run effect".

Mr. Ferguson: I will interpose an objection to this as not being proper cross examination. It does not relate to any matters on the direct examination, and it is not calculated to test the veracity of the witness.

The Witness: I would like an instruction as to whether I should proceed.

By Mr. Fourt:

Q. Just go ahead and finish reading the paragraph.

A. I have read it.

Q. Is it true, Mr Biggar, that you were the draftsman of defendants' exhibit B for identification?

A. This report was issued over the signature of Mr. Frank M. Kent, Chairman of the 1955-56 Avocado Administrative Committee. I prepared a substantial portion of this under his direction. I don't know whether you would construe that as being the draftsman.

Q. With respect to paragraph 3 on page 12, and at the top of page 13, of defendants' exhibit B for identification, [fol. 53] were you the author of that paragraph?

A. Co-author, I would say.

Q. At the time you wrote that paragraph was it your opinion that "A secondary short-run effect of maturity regulations appears to be a tendency to encourage the picking of fruit of the regulated variety and size as soon as

regulations permit, rather than to let some of it go until a later date in the season, as would normally be done in the absence of regulations"?

A. I wish you would restate that question.

Q. At the time you wrote this paragraph or at the time you co-authored it, was it your opinion that the short-run effect of maturity regulations appears to be a tendency to encourage the picking of fruit of the regulated variety and size as soon as regulations permit, rather than to let some of it go until a later date in the season, as would normally be done in the absence of regulations?

A. I wouldn't want to say that this was solely my opinion. I would say that it was the joint opinion of myself and Mr. Kent. If you take this paragraph of the report in its entirety, or this section of the report in its entirety, I would say that it would be a joint opinion, but I don't like to have you take fragmentary portions thereof and be quoted on it. I don't like to be quoted, as I consider I am being quoted now, out of context by taking just a small portion of a report and saying that is my opinion without further qualification. I might state that this report was prepared to be [fol. 54] considered in its entirety, and it wasn't prepared for bisecting.

Q. Would it not be fair to you if you were asked whether it was your opinion at that time, or you may explain your answer if you so desire?

Mr. Ferguson: I think the witness has already answered.

The Witness: I consider that that exhibit is offered in toto, and not just a fragmentary portion of it. If I were given a chance to pick out fragments of this report, I would pick out other sections to emphasize it.

By Mr. Fourt:

Q. Then would it be more correct to say that the language submitted on pages 12 and 13 of defendants' exhibit B for identification, represents the opinion that you held at that time?

A. I wouldn't go that far. I would say that it represents the opinion of the Avocado Administrative Committee who

issued this report, I being merely the tool of the Committee who prepared the report.

Q. Then would it be fair to say that this report does not reflect your opinion?

A. I don't want to take issue with you, but I want to point out that I was acting as an administrative agent of the Avocado Administrative Committee, as its manager, and not as a technical expert. I do not sit here as a technical expert. I sit here as an administrator and as such [fol. 55] do not consider myself as an expert on these matters. On these expert matters, I will refer you to my employers who are experts in the field.

Q. Then you personally do not vouchsafe the accuracy of any statements made in defendants' B for identification?

Mr. Ferguson: The exhibit contains statistical data and numerous statements of fact. It also contains discussions which are included as opinions, whereas the question put to the witness would make it appear that there is nothing in the report but statements of opinion.

By Mr. Fourt:

Q. Then, Mr. Biggar, is it your position that although you wrote, in conjunction with other members of the Committee, defendants' exhibit B for identification, that this work does not represent your views but represents other views?

A. Exactly.

Q. I direct your attention to page 14 of defendants' exhibit B for identification and ask you if you will read the paragraph entitled "1" which appears in the middle of the page?

A. Under "Quality and Orderly Marketing Recommendations"?

Q. Yes.

A. I have read it.

Q. Did you personally write that paragraph?

A. In cooperation with the members of the Committee.

Q. Perhaps subject to their direction?

A. All of this is subject to their direction.

Q. What did you mean when you wrote the last three

[fol. 56] words of that paragraph, "disorderly marketing practices"?

Mr. Ferguson: I want to interpose the objection that this is not proper cross examination for the reasons already indicated.

The Witness: I want to clarify the fact that this report was typed by my secretary, who is not responsible for the opinions on this matter either. Now, what was your question?

By Mr. Fourt:

Q. When you used the language in this paragraph "disorderly marketing practices," as you use it in that paragraph, what did you mean?

A. That expression I believe was used to discourage a tendency to move volumes of fruit at irregular intervals. For instance, if you marketed one bushel this week and a thousand bushels next week, then one bushel the following week and a thousand the next week, that would be possibly disorderly marketing. If you divided the two thousand and two bushels equally among the four weeks, that would be in my opinion very orderly marketing.

Q. Would it be true that in order to constitute disorderly marketing practices in the Florida Avocado Industry that this increase in marketing of fruit would have to involve many thousands of bushels?

A. Not necessarily. I believe if you will refer to the other evidence submitted, the other exhibits submitted, you will find that our volume ranges upwards from less than one hundred bushels a week to more than thirty-four thousand [fol. 57] bushels a week in this particular season.

Q. Is it true that during the peak volume period of your season that it would take many thousands of bushels of additional shipments to constitute disorderly marketing practices?

A. I think that particular reference here is made to picking itself. Sometimes people choose to hold their fruit for early picking. In other words, we have a very complicated system in order to assure the market of getting matured fruit by varieties, and that requires spot picking of these

groves, and some growers complicate the orderly marketing system by withholding until all the weight restrictions are removed, taking a loss from drops, and of course that frequently causes a disorderly marketing condition perhaps with too much fruit at one time. In order to understand this, for instance, a man may be permitted to pick on a percentage of oil content, and he may choose not to pick it on a percentage of oil content—he may wait until his oil is up to twenty-eight percent instead of eight percent, however, he would be allowed to pick that fruit.

Q. I would like to direct your attention to defendants' exhibit C for identification, which is the 1956-57 AAC report, and ask if you will read to yourself the top paragraph on page 9?

Mr. Ferguson: Please note the same objection that I previously interposed, namely, that this is not proper cross examination.

The Witness: I have read it.

[fol. 58] By Mr. Fourt:

Q. Did you author that precise paragraph?

A. As I said before, in cooperation with the members of the Avocado Administrative Committee.

Q. What was meant by the words there "but lacked the precision in establishing maturity that is deemed desirable"?

A. I won't be quoted out of context.

Q. The sentence is:

"Seedling maturity regulations tended to reduce the quantity of immature fruit of this type reaching the market, but lacked the precision in establishing maturity that is deemed desirable."

What was meant by the phrase "lacked the precision in establishing maturity"?

A. The Committee has bordered on a widely accepted acknowledgment that a universal test of maturity is a difficult, if not impossible, goal to reach. Various standards have been measured from time to time, but to apply a uniform application to all varieties, it is an acknowledgment

that we are still searching for, that is, a universal measure of maturity of avocados. We have not reached this goal, and the Committee recently recommended that we should not be deterred by the difficulties facing the solution of this universal problem, but to continue to search for a perfect measure of maturity which may apply equally well to all avocados, irrespective of source or variety.

Q. During the operation of the Marketing Order for the [fol. 59] past three years have there been any violations by itinerant truckers picking up avocados in Florida and taking them out of the state without obtaining a certificate within the State of Florida?

A. I am not in a position to say whether there have been violations. I don't believe that anyone could say whether there has been any violations.

Q. Well, during the period of time that the Marketing Order has been in effect have there been any convictions of persons who have violated the Marketing Order?

A. Do you want to qualify that, as you did the first statement, with "out of state"?

Q. In your answer you may qualify that.

A. I will qualify it. We have had several convictions, all of which have been within the state.

Q. What was the nature of the violations?

A. The violations were largely grade violations, fruit which failed to meet the grade requirements, not maturity standards; in other words, fruit which would meet the maturity standards but which had surface defects on the fruit that caused it to be ruled out for grade. Mostly the violations had to do with their failure to take inspection. One of the requirements of the Federal Marketing Order is that each handler shall submit his fruit for inspection, and any failure to submit it for inspection is a violation of the Order. In some cases you may submit it for inspection [fol. 60] when picked. Failure to submit the fruit for inspection puts you in violation. In this case most of the violations were merely failures on the part of people acting in the capacity of handlers to have their fruit inspected.

Q. Did it happen that these persons who were convicted for violating the Marketing Order,—were they registered under the Marketing Order as handlers?

A. We had no registered handlers convicted.

Q. Were those persons who were convicted in the category of small operators or in the category of large operators?

A. I do not have the list of those who were convicted before me, and I would have to check that list in order to completely classify those who have been convicted. We do not generally have readily available classifications of that type of thing.

Q. Does the Florida regulation as it is now written affect any other avocados than Florida avocados?

A. No.

Q. Is it true that it affects only Florida handlers of avocados?

A. That is a statement that I would have to clarify. It affects any handler who handles avocados produced in Florida.

Q. Does the Florida Marketing Order affect California avocados which enter the State of Florida?

A. No.

Q. Is it true that avocados which can meet the Grade 1 [fol. 61] standard as defined in the Marketing Order, may at the same time be immature in the sense of the Maturity Regulations?

A. Technically speaking, no.

Q. Why is that so?

A. I will have to refer back again to that sub-section, if you will permit me.

Mr. Ferguson: It is attached to the Complaint as exhibit C.

The Witness: It reads: "Number 1 grade consists of avocados of similar quality characteristics which are mature but not overripe."

So if they were mature under the grade, they would be mature under the quality regulations. Therefore, technically speaking, avocados that would meet the number 1 grade could not be immature.

By Mr. Fourt:

Q. I show you plaintiffs' exhibit 10 for identification, which is also designated "AAC-412", and ask if you have

any figures on units of Florida production intended for California destinations?

A. As previously stated, the statistics issued covering Florida avocados as represented by our exhibit 3 which you have in your hand, the yellow copy, does not indicate destination.

Q. What was the source of the information regarding the units for Florida destination?

A. As I mentioned before, I am also manager of the Lime [fol. 62] Distributors Committee, which Committee receives certificates of a slightly different form. This certificate indicates the owner of the vehicle, the license number, the address of the vehicle, and also indicates the destination in the state or out of the state.

I have prepared for my own use a table showing the various license numbers of vehicles employed in transporting avocados to Florida destinations. The statistics are checked weekly against this table showing these particular license numbers, and these license numbers are used to determine what lots of avocados are going to Florida destinations. I previously stated, sir, that we realize that certain of these avocados go out of the state, and that there are some common carriers who deposit fruit in the state that we assumed to be going out of the state, and we have assumed that these two offset one another to a large extent, and it is my opinion that these figures shown at the bottom of this AAC-412, to which we are now referring, are in substance correct.

Q. Then the figures shown on plaintiffs' exhibit 10 for identification, which is also AAC-412, are approximate only?

A. In substance that is a correct statement.

Q. Is it true that you account for the difference between "total units packed" and "units for Florida destinations", by the units that go to other destinations, which destinations you don't know?

A. That is right.

[fol. 63] Mr. Fourt: Mr. Reporter, I hand you what purports to be minutes of a meeting of the Avocado Administrative Committee held on May 14, 1957, and I will ask you to identify that as defendants' exhibit D for iden-

tification. Also let the record show that I am showing defendants' exhibit D for identification to Mr. Ferguson.

By Mr. Fourt:

Q. I show you defendants' exhibit D for identification and will ask you to identify that document, please.

A. This is a copy of the minutes of the Avocado Administrative Committee, dated May 14, 1957.

Q. I will ask you to identify the two exhibits which are attached to defendants' exhibit D for identification?

A. I have two forms attached to the minutes. One is entitled "AAC-362—LAC-269," and it is entitled "Proposed Joint Budget—Avocado and Lime Administrative Committees, 1957-58 Season". The other one is identified for our record as "AAC-363", and is entitled "Report of Sub-Committee on Maturity".

Q. In your capacity as manager of the Avocado Administrative Committee on May 14, 1957, did you act as secretary of that meeting?

A. No.

Q. Did you attend that meeting?

A. Yes, sir.

Q. Who acted as secretary of that meeting?

A. The secretary of that particular meeting was Mr. [fol. 64] R. R. Kinard, the elected secretary of the meeting.

Q. To the best of your knowledge, does defendants' exhibit D for identification constitute a true and correct copy of the minutes of the meeting of the Avocado Administrative Committee held on May 14, 1957?

A. Once again I will refer you to the subsequent meeting of June 11, 1957, at which time these minutes were approved and adopted.

Q. Then it is true that to the best of your knowledge defendants' exhibit D for identification is a true and correct copy of the minutes of the meeting of the Avocado Administrative Committee held on May 14, 1957?

A. Yes.

Mr. Fourt: Now, Mr. Reporter, in order to save time, I will ask you to mark for identification as defendants' exhibits next in number the minutes of the meetings of

the Avocado Administrative Committee dated June 11, 1957, July 9, 1957, August 13, 1957, September 3, 1957, September 10, 1957, October 8, 1957, November 12, 1957 and December 10, 1957.

(Said minutes marked defendants' exhibits E through L, respectively, all for identification.)

By Mr. Fourt:

Q. I show you defendants' exhibit E for identification and ask you if you will identify it, please?

A. Defendants' exhibit E for identification are minutes of the meeting of the Avocado Administrative Committee of June 11, 1957.

[fol. 65] Q. Now identify defendants' exhibit F for identification.

A. Defendants' exhibit F for identification are the minutes of a meeting of the Avocado Administrative Committee of July 9, 1957.

Q. Now identify defendants' exhibit G for identification.

A. Minutes of a meeting of the Avocado Administrative Committee of August 13, 1957.

Q. And now identify defendants' exhibit H for identification.

A. Exhibit H for identification are minutes of a "Telephone" meeting of the Avocado Administrative Committee held on September 13, 1957.

Q. Mr. Biggar, what is connoted by the words "Minutes of a telephone meeting of the Avocado Administrative Committee"?

A. First, I will refer you to the second amendment to the order regulating the handling of avocados grown in South Florida, reprinted from the Federal Register of May 21, 1957. It says, under Item 3, sub-section 969.30 (b):

"The Committee may provide for simultaneous meetings of groups of its members assembled at two or three designated places, provided that such meetings shall be subject to the establishment of telephone communication between all such groups, and the availability of loud-speaker receiv-

[fol. 66] ers for each group, so that each member may

participate in the discussions and other actions, the same as if the Committee were assembled in one place."

Q. Is it true that the meeting of the Avocado Administrative Committee held on September 3, 1957 was held by the participants being in communication with each other by telephone?

A. Correct.

Q. Is it true that you participated in the conferences to the extent that you were in telephonic communication with the rest of the members attending that meeting?

A. Part of the meeting was conducted in the Committee offices at Homestead, at which location we have a special telephonic arrangement, with a loud speaker, by which a group assembled in one area can converse with the group assembled in another area or areas. I was present in the room at the time.

Q. I show you defendants' exhibit "I" for identification and ask you to identify it?

A. These are minutes of a meeting of the Avocado Administrative Committee held on September 10, 1957.

Q. I show you defendants' exhibit J for identification and ask you to identify same?

A. Defendants' exhibit J for identification are the minutes of a meeting of the Avocado Administrative Committee held on October 8, 1957.

Q. Identify defendants' exhibit K for identification.

[fol. 67] A. Defendants' exhibit K for identification are minutes of a meeting of the Avocado Administrative Committee held on November 12, 1957.

Q. And please identify defendants' exhibit L for identification.

A. These are minutes of a meeting of the Avocado Administrative Committee held on December 10, 1957.

Q. I show you defendants' exhibits "D" through "L" for identification, which you have previously identified, and ask if to the best of your knowledge and belief they constitute a complete set of the minutes of the Avocado Administrative Committee during the period of time from May 14, 1957 to date?

A. I identified these individually, and have not had occa-

sion to check to see if it is a complete list. I will be glad to check it, because I have a complete list here.

Q. Please do so.

A. If the reporter will call back to me the ones that I have identified, in the order in which they were identified, I will be glad to check them.

(Said check made between reporter and witness.)

The Witness: No; that is not all of them. We did not get the minutes of the meeting of April 9, 1957.

By Mr. Fourt:

Q. Exclusive of the minutes of the meeting of April 9, 1957, do defendants' exhibits for identification "D" through "L" constitute a complete set of the minutes of the meetings [fol. 68] of the Avocado Administrative Committee from May 14, 1957 to December 10, 1957?

A. Yes. There was a subsequent meeting of Jan. 14th, the minutes of which have not been distributed. The minutes of the December 10th meeting were prepared at that time, and they are the official minutes. This is a sloppy way to check it, the way I did it, so I had better go back and check the ones that were called off because I may have missed some, some that I didn't check off. Having checked them off, I now state that these constitute a complete set of the minutes, with the exception of the one of April 9, 1957.

Q. To the best of your knowledge and belief do defendants' exhibits D through L constitute a true and correct list of the minutes of the meetings held on May 14, June 11, August 15, September 3, September 10, October 8, November 12 and December 10, 1957?

A. You said "list". Do you mean "copies of the minutes"?

Q. Yes.

A. I can only assume that they do. I have no reason to say anything to the contrary. I have examined them item by item, and they are complete as I presented them to you.

Q. Is it true that these minutes were recorded and furnished in the usual and normal course of business of the Avocado Administrative Committee?

A. Yes.

Q. Are you personally acquainted with a person by the [fol. 69] name of Fred Piowaty?

A. Yes, Mr. Fred Piowaty and I are very well acquainted.

Q. Who is Mr. Piowaty?

A. Mr. Fred Piowaty is a member of the Avocado Administrative Committee.

Q. During the 1956-57 season, was he Chairman of the Grades Sub-Committee and the "Handler Registration Sub-Committee", and a member of the Committee itself?

Mr. Ferguson: Of course all of these questions are under the objection as not being proper cross examination.

The Witness: Refreshing my recollection with the 1956-57 annual report, page 3, which has been submitted as an exhibit here, it lists Mr. Fred Piowaty as Chairman of the Grades Sub-Committee, as a member of the "Container Research Sub-Committee" and as Chairman of the "Handler Registration Sub-Committee".

By Mr. Fourt:

Q. Then is it true that in addition he was a handler member on the Committee?

A. Page 2 of this same report, which has been submitted in evidence as an exhibit, shows Mr. Fred Piowaty as a handler member from district 1.

Q. Are you acquainted with Mr. H. E. Kendall?

A. I am.

Q. Who is Mr. H. E. Kendall?

A. He is a present member of the Avocado Administrative Committee.

[fol. 70] Q. Does he serve in any other capacity or on any of the Committee or Sub-Committees of the Avocado Administrative Committee?

A. I would have to check the minutes for that. We have so many Sub-Committees that I have some difficulty in remembering who serves on which. I assume that he is, however, it would be reflected in the minutes, defendants' exhibits D through L.

Q. Is it true that Mr. Kendall was a member of the Avocado Administrative Committee during the 1954-55 season?

A. The annual report of the Avocado Administrative

Committee for the 1954-55 season shows that Mr. Harold E. Kendall was a handler member from district 1.

Q. Is it true that he was a member of the Committee during the 1955-56 season?

A. He was a handler member from district 1 during the 1955-56 season.

Q. Is it true that Mr. Fred Piowaty was a member of the Committee during the 1954-55 season and the 1955-56 season?

A. During the 1954-55 season Mr. Fred Piowaty was a handler member from district 1. During the 1955-56 season Mr. Fred Piowaty was a handler member from district 1.

Q. Is it true that you serve at the pleasure of the Board?

A. Of course.

Q. A majority vote could remove you from office?

A. I understand that is true.

Mr. Fourt: No further questions.

[fol. 71] Redirect examination

By Mr. Ferguson:

Q. Is it a part of the duty of the Avocado Administrative Committee under the Secretary's Order to aid in the investigation and furtherance of the prosecution in cases of violations of any of the maturity or quality regulations?

Mr. Fourt: I object to the question as leading. It doesn't prosecute anything. The Committee investigates and the prosecution is conducted entirely by the Secretary of Agriculture.

The Witness: Yes, it does that.

By Mr. Ferguson:

Q. I think you said something about violations within the state.

A. That is right.

Q. I think you also said that you knew of no violations with respect to shipments out of the state.

A. I know of none, but I would have to search my records on that.

Q. If there were a case of a shipment out of the state without a certificate of inspection by the joint Federal-State Inspection Service, would the Avocado Administrative Committee in due course of the performance of its duty participate in the investigation of such violation?

A. We would not actually investigate it. We would report the information which we had, if it came to us before it came to the Department of Agriculture, to the Internal Audit Division of the Department of Agriculture, who would conduct the investigation.

[fol. 72] Q. You were asked a question about a sentence that appears at the top of page 9 of the 1956-57 annual report of the Avocado Administrative Committee, the first word in the sentence being "Seedling".

A. That is right.

Q. What is a seedling?

A. A seedling is a tree which has been grown from a seed. Once again, sir, I must advise you that I am not skilled in the biological aspects. A seedling has the characteristics of the "parents"; in other words, it is not a non-descript individual.

Q. It is not yet a named variety and may never become one?

A. A seedling could be a named variety, but there may be only one tree. Once again, sir, I must advise you that this is out of my field, variety classifications and that sort of thing. I am not qualified to give a specific definition, however, a seedling is a single growth which someone may christen with the name of George, but it is not recognized by the trade as a variety.

Q. Turning to pages 18 and 19 of this same annual report, which pages have already been identified as plaintiffs' exhibit 7 for identification, is there a tabulation under the caption "Seedling"?

A. There is a total of 13,124 bushels, which consists of seedlings, but in this particular instance, although it is not clearly indicated in the title, there are very few trees of fruit that have been tradenamed by individuals for personal [fol. 73] reasons as a rule, but not in sufficient quantity whereby recognition is given thereto other than as "seedling" or as an unlisted variety.

Q. Going back to page 8 of this same annual report, a copy of which has been marked as an exhibit in this case, is there mention of "Seedlings" in this schedule of shipping dates?

A. There is no mention of seedlings, but at the top of the page it is stated:

"The following shipping schedule was applied to named varieties during the 1956-57 season."

Q. If the reporter will mark this page entitled "Avocado Shipping Dates, 1956-57 season", as plaintiffs' exhibit 14 for identification.

A. That copy has been marked to show subsequent changes after the date of the issuance of this particular copy, but my copy is not marked to show these subsequent changes. I think that later in the minutes—

Q. I don't think that is pertinent to the question I am going to ask you. Is this a true and correct summary of the shipping dates fixed by the order of the Secretary of Agriculture for the season 1956-57?

A. It is.

Q. Is it the same as page 8 of the annual report except that it has some additional matter at the bottom part of the page which is not reproduced on page 8 of the annual report?

A. Page 8 is a reproduction of this form that you have [fol. 74] just submitted as plaintiffs' exhibit 14 for identification, down through all of the named varieties. At the bottom of plaintiffs' exhibit 14 for identification there are some—

Q. Wait a minute. We will come to that. Is it down to the point on the page marked plaintiffs' exhibit 14 for identification which begins with "All weights in ounces, diameters in inches"?

A. Yes.

Q. That is the end of page 8; is that correct?

A. Yes.

Q. Everything below that on plaintiffs' exhibit 14 is not included on this page 8?

A. That is correct.

Q. Now was there a regulation of shipping dates for seedlings in the 1956-57 season?

A. Yes.

Q. And is that regulation included in this completed statement of shipping dates now marked plaintiffs' exhibit 14 for identification?

A. Yes.

Q. On plaintiffs' exhibit 9 for identification, which has already been marked as an exhibit, is a regulation of shipping dates for seedlings?

A. Yes.

Q. Does this paragraph at the top of page 9 of this annual report relate entirely to the subject of seedling maturity? [fol. 75] Suppose you go ahead and read it and then answer the question.

A. That is right.

Q. Then you were asked whether the grade regulations included any requirement as to maturity and, as I recall, you answered by reading the grade regulation as to number 1 grade and the requirement that the avocados of that grade must be mature. Now I ask you to tell us whether there is a maturity requirement included in number 2 grade?

A. There is a maturity requirement in both number 2 and 3 grades.

Q. And there is a combination grade?

A. A combination grade of 1 and 2, and they have the same maturity requirement.

Q. Are there any other grades?

A. Numbers 1, 2 and 3, and the combination of 1 and 2 grades.

Q. Each of those has a maturity requirement?

A. Yes.

Q. And isn't it a fact that all other avocados are classified as culls?

A. No, sir, that is not the case: All other avocados are classified as unclassified.

Mr. Fourt: May the record note my objection to the leading questions.

By Mr. Ferguson:

Q. Are they called culls?

Mr. Fourt: Again I object to the leading question.

[fol. 76] The Witness: It is common practice within the industry to call them culls. In other places they might refer to them simply as "unclassified".

Paragraph (e) of sub-section 969.130, previously referred to, states:

"Unclassified. 'Unclassified' consists of avocados which have not been classified in accordance with any of the foregoing grades. The term 'unclassified' is not a grade, as used herein, but is provided as a designation to show that no grade has been applied to the lot."

By Mr. Ferguson:

Q. Now, is there any regulation covering the shipment of avocados described as "unclassified"?

A. The regulations make no mention of "unclassified". The requirement is that the avocados at the present time must meet the minimum requirement of the Avocado Administrative Committee number 2 grade, containing not less than twenty-five percent number 1 grade, as previously indicated.

Q. That would prohibit the shipment of any avocados below the grade which you have just described, the combination 1 and 2?

Mr. Fourt: I object to the leading question.

The Witness: Section 969.54, entitled "Inspection and Certification", states:

"Whenever the handling of any variety of avocados is regulated pursuant to Section 969.51, each handler who [fol. 77] handled avocados shall, prior thereto, cause each lot of avocados handled to be inspected by the Federal-State Inspection Service and certified by it as meeting the applicable requirements of such regulation."

That in and of itself would prohibit the handling of any avocados which were unclassified. This sub-section 969.54 requires that they all be classified, and the order as of the

immediate moment would require that they meet the minimum of AAC 2 grade and contain not less than twenty-five percent number 1 quality fruit.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Mr. Biggar, directing your attention to plaintiffs' exhibit 9 for identification—

A. Is this the publication that I have entitled "Avocado Shipping Dates, 1957-58 Season"?

Q. Yes. It is also designated AAC-417. Isn't it true that the first regulation issued by the Avocado Administrative Committee during that season provided only for a "Date A" for one or more of these varieties?

A. I would have to check to see what that first one was.

Q. Let me rephrase the question. My purpose now is to establish the progressive nature of the regulation which is set forth in plaintiffs' exhibit 9 for identification. Is it true that insofar as plaintiffs' exhibit 9 for identification is concerned that the first regulation which is incorporated in [fol. 78] this exhibit provided only an opening shipping date which is called "Date A"?

A. I don't believe that is correct. I will check that right now. I will refer to the orders themselves, Mr. Fourt, since you are making reference not to the exhibits but to the orders preceding the exhibits.

Q. All right.

A. The first of these is the one that you requested. I am looking now at Avocado Order 14, the original order. This Avocado Order 14, the original order, fixed the date of the varieties, to the extent that they used the word "varieties", and it did fix other dates for seedlings and unlisted varieties.

Mr. Ferguson: I don't think he got your question. Perhaps you had better put it to him again.

Mr. Fourt: No; that is all right.

Mr. Ferguson: That is not an answer to your question.

Mr. Fourt: Let me proceed.

By Mr. Fourt:

Q. Subsequent to the regulations which established the dates in column "A" for the given varieties, isn't it true that the subsequent regulation would establish the dates which are listed in the column following, namely, "Date B"?

A. No, that is not necessarily correct. It might have been a change of date in column A. This order 14, issued on May 21st, to become effective at 12:01 A.M., Eastern Standard Time, May 26, was in the way of a general stop order, with respect to a number of varieties and dates, prohibiting the handling of those varieties before certain dates. It [fol. 79] also gave consideration to regulations affecting varieties not listed anywhere. It was issued, according to my knowledge, on the understanding that prior to the dates shown on this order, recommendations would be made to the Secretary of Agriculture, either recommending these same dates or other dates or additional dates.

Q. Now, directing your attention back to AAC-417, being plaintiffs' exhibit 9 for identification, and limiting my question only to the variety known as "Booth 8", wouldn't the first regulation for Booth 8 have established the opening date of September 16, 1957?

A. No. It would have set the date as September 9th.

Q. And that date is not shown in plaintiffs' exhibit 9 for identification?

A. No. The subsequent amendment to that shows the date of the 16th.

Q. Following the establishment of the date which appears in "Date A", then would the next succeeding regulation have established the date of September 30th?

A. Not the same one. The 16th order established the 30th date. Suppose we go to the specific amendment instead of talking off of the record, and this should be more enlightening to all of us.

Mr. Ferguson: Incidentally, this was pleaded and admitted by the Answer, each one of these maturity orders for the 1957-58 season.

[fol. 80] The Witness: The amendment that established the date September 16, 1957, in column "A", as shown in the exhibit, also established the "Date B" of September

30th, and the "Date C" of October 14th and the "Date D" of October 28th.

By Mr. Fourt:

Q. And what is the date of the order from which you just quoted?

A. The date of the order from which I just quoted, and the title of the order which I have just mentioned, is amendment 4 to Avocado Order 14, issued on September 5, 1957.

Q. Would that have been published in the Federal Register?

A. It would have been, but I don't know the number.

Mr. Ferguson: It is pleaded as FR 7173.

By Mr. Fourt:

Q. On what date was the regulation promulgated which established the withdrawal of all maturity regulations for the Booth 8 on the date of November 18, 1957?

A. Amendment number 5 to Avocado Order 14, section (f), item 5, reads as follows:

"During the period beginning at 12:01 A.M., Eastern Standard Time, October 28, 1957, and ending at 12:01 A.M., Eastern Standard Time, November 18, 1957, no handler shall handle any avocados of the Booth 8 variety unless 2 15/16th inches in diameter."

Q. Do you have the Federal Register number for amendment number 5?

[fol. 81] Mr. Ferguson: Give me the date and I will give you the number.

The Witness: The effective date was 12:01 A.M., Eastern Standard Time, November 18th.

Mr. Fourt: I am talking about the date of the order itself.

Mr. Ferguson: The Federal Register number is 22 FR 7357.

The Witness: I believe the question was as to the date of the order. The date of the order is September 12, 1957.

Mr. Fourt: Mr. Reporter, I hand you a document headed "Recap of Effective Rules and Regulations Issued Pur-

suant to the Order Regulating the Handling of Avocados grown in South Florida," which is also designated "AAC-373", and will ask that it be marked as the defendants' next exhibit number.

By Mr. Fourt:

Q. I hand you a document now marked as defendants' exhibit M for identification and will ask you to identify it, Mr. Biggar.

A. The sheet is entitled "Recap of Effective Rules and Regulations Issued Pursuant to the Order Regulating the Handling of Avocados Grown in South Florida." It is further identified as form AAC-373, revised 11-12-57.

Q. Is this an official document issued by the Avocado Administrative Committee?

A. All documents issued by us are official, I presume. This was issued as a Secretary's Regulation, in fact, for [fol. 82] convenience of shippers and growers.

Q. It is an official document of the Committee?

A. The only official documents we have are our minutes and our financial reports. This is really a publication.

Q. Made in the pursuance of the administration of the Marketing Order?

A. Yes.

Mr. Fourt: Now, Mr. Reporter, I hand you a document entitled "Avocado Administrative Committee Rules and Regulations", and will ask that you mark this document as defendants' exhibit N for identification.

By Mr. Fourt:

Q. Mr. Biggar, will you please identify defendants' exhibit N for identification?

A. Defendants' exhibit N for identification is entitled "United States Department of Agriculture, Agricultural Marketing Service, Avocado Administrative Committee Rules and Regulations, Grade Standards, as amended". It is reprinted from the Federal Register of April 13, 1956, and I would further identify it as subsection 969.130.

Q. Is this regulation, defendants' exhibit N for identification, presently in effect?

A. Yes.

Q. When was its effective date?

A. I would have to see the original.

Mr. Ferguson: I wish to remind you, Mr. Fourt, that this [fol. 83] is exhibit C attached to the Complaint. If you want to offer another copy, that will be O.K. If you want a copy, you may detach the original exhibit from the Complaint. It is the same as exhibit C to the Complaint.

Mr. Fourt: May it be stipulated that defendants' exhibit N for identification is the same as exhibit C to the Complaint?

Mr. Ferguson: Yes.

The Witness: Mr. Fourt, do you want an answer to the question about the effective date, which I am in the process of picking out?

Mr. Fourt: Yes.

The Witness: The only thing I have here is something which shows notice of proposed amendment to rules, which is dated March 12, 1956, with a pencil notation at the top. I don't have a copy of the order itself, so I do not know the exact effective date.

Mr. Fourt: That is all.

Redirect examination.

By Mr. Ferguson:

Q. I wish to ask you a question for the purpose of clarification. You have referred to the fact that the Secretary issued a maturity regulation dated May 23, 1957, which was a restatement of the shipping date used in the preceding season; is that right?

A. I made a statement similar to that, yes.

Q. Listing forty-five named varieties?

[fol. 84] A. I have here the original of Order 14 which lists a large number of varieties, showing only one date. It is a list of forty-five varieties showing only one date.

Q. Did you send to the growers a bulletin of the kind that

has been shown here, setting up this schedule of shipping dates?

A. No, I did not.

Q. What regulation comes next?

A. You mean subsequent to that particular one?

Q. Yes.

A. Amendment number 1 would have been the first change subsequent to that.

Q. Was that June 17, 1957?

A. Amendment number 1 is dated June 13, 1957.

Q. Perhaps I stated the publication date. June 13th is the date?

A. Yes.

Q. Is that your AAC-372?

A. You mean was that reported to the growers in the form of 372?

Q. Yes.

A. AAC-372, amendment 1, is the approved dates for Fuchs, Pollock, Simmonds, Hardee and Nadir.

Q. Five varieties?

A. Yes.

Q. And in each instance it gave a Date A, Date B, Date C [fol. 85] and Date D for each variety?

A. Yes.

Q. Is it not likewise true that in each instance where dates were assigned for additional varieties, that the establishment of each variety in each instance was the four dates that you have listed as Date A, Date B, Date C and Date D?

A. That is correct.

Q. And that was always the case?

A. Yes.

Q. On the Booth 8s you have a "Date A" and later a "Date B"—

A. I might say that the only time one date is used is in the form of a stop order at the beginning of each season when we are unable to determine the actual date. These dates are used for the purpose of establishing a stop order, listing the varieties, as a method of holding it up until such time as an accurate date can be determined.

Q. Just one further question. This exhibit 9 for iden-

tification, which is a summary of shipping dates for the 1957-58 season,—is this a true reflection of the orders as made for each of the varieties in each case, including the four dates?

A. As made and possibly as amended at later dates. I believe these first five remained unchanged, and it is possible that one of the subsequent amendments changed one or more of these dates. As of the time of the issuance of this AAC-417, which you have identified as plaintiffs' exhibit 9, that encompassed all of the amendments for all [fol. 86] of the varieties shown therein, as taken from the Secretary's Orders.

Q. Did each order and each amendment, after that first one that we have called a stop order, in every instance assign the four dates, A, B, C and D as you have them listed here?

A. Yes.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Isn't it a fact that AAC-417, which is plaintiffs' exhibit 9 for identification, was true and correct as of October 8, 1957, the date of this issuance?

A. As I explained earlier, it was in anticipation of regulations being issued on October 14th, in accordance with the recommendations that the Committee made on October 8th.

Q. As to one or more of these varieties, isn't it true that there may have been an amendment to the original date in each case until the later amended date would appear?

A. Correct.

Mr. Fourt: I have nothing else.

Mr. Ferguson: I think it would save some time if the reporter would mark these nine pages as plaintiffs' exhibit 15 for identification.

Redirect examination.

By Mr. Ferguson:

Q. Do these nine pages now marked plaintiffs' exhibit 15 for identification comprise all of the bulletins issued by [fol. 87] the Committee, setting forth the maturity orders made by the Secretary of Agriculture for the season 1957-58, other than the order which we have mentioned of May 23, 1957, that being at least its publication date?

A. Yes, it encompasses even part of that. It does state a portion of the missing order of May 23, 1957, but it doesn't list the schedule as such. It does include a mention of the shipping dates that you have on there, and perhaps the last six or seven remain unchanged pending further recommendations as the season progresses.

Q. Now turning to the second page of this bulletin AAC 372, dated June 13, 1957 you have already answered that that lists five varieties and four dates for each variety; is that correct?

A. Yes.

Q. Is that an exact copy of the Secretary's Order?

A. Yes.

Q. And the page dated July 11, 1957

A. That lists five additional varieties.

Q. And so that makes a total of ten that you have mentioned?

A. Yes.

Q. And this is a copy of the order?

A. Yes.

Q. The next one is dated August 14, 1957

A. Yes; that added one.

Q. Added one more?

[fol. 88] A. Yes; Fairchild.

Q. And the one of September 11, 1957, does that add some more varieties?

A. It contains twenty-four varieties.

Q. And in each instance with how many dates?

A. All four dates.

Q. Is that an exact copy of the Secretary's Order?

A. Yes.

Q. Does this bulletin of September 11, consist of two pages, one marked AAC-405, and one marked AAC-407?

A. Yes.

Q. Does AAC-405 contain a preliminary schedule for some more varieties?

A. Yes.

Q. Does AAC-407 show that this preliminary schedule has been made official by approval of the Secretary of Agriculture?

A. No.

Q. It does not?

A. No. This schedule shown on AAC-407, is a recapitulation of the maturity dates, issued by the Secretary of Agriculture up to and including September 11th, named varieties and seedlings alike.

Q. What is the next one?

A. The next one is dated October 9, 1957, and it is designated AAC-418, bulletin 57-58-8, and it refers back to the [fol. 89] preliminary schedule, AAC-405, and indicates approval and recommendations by the Committee of these dates. It also calls attention to all concerned to the pink schedule, which we have here as exhibit 9, which is a recapitulation of all of the weights and dates and sizes in their final form.

Q. You have already stated that although this is published as of October 8, 1957, it was a few days later before it was made an official order by the Secretary of Agriculture?

A. That is right.

Q. Now again, and finally, in each instance when another variety was issued, or when another variety was named, the four dates are assigned, namely, A, B, C and D?

A. Correct.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. During the 1957-58 season to date has the Secretary of Agriculture declined to issue any of the orders rec-

ommended to him by the Avocado Administrative Committee?

A. Yes.

Q. In what respects or can you give some examples?

A. I can't tell you right offhand, but I can go back through the recommendations and through the orders and try to pick them out, where the Committee has recommended action and the Secretary of Agriculture refused to issue orders thereon.

Q. Did the Secretary of Agriculture decline to issue any [fol. 90] maturity regulations recommended to him by the Avocado Administrative Committee?

A. No.

Q. Is that same situation true with respect to the maturity regulations issued by the Secretary of Agriculture in the 1954-55 season and the 1955-56 season?

A. You mean have they always followed the Committee's recommendations?

Q. As to maturity only?

A. Yes.

Q. Is the same thing true of the season 1956-57 as to maturity regulations only?

A. As to avocados produced in Florida the Secretary has always followed the Committee's recommendations.

Mr. Fourt: That is all.

Redirect examination.

By Mr. Ferguson:

Q. One further question. At the meetings when these recommendations were made by the Avocado Administrative Committee, was there present a representative of the Secretary of Agriculture?

A. I cannot vouch for every instance, but in practically every instance, the answer would be yes. I believe there was one meeting, the telephone meeting, when we didn't have a representative of the Department of Agriculture present. We have quite a large number of representatives of the Department of Agriculture at each meeting, but they [fol. 91] may not be the direct representative of the Secre-

tary as a field representative. I believe in most instances, in fact I am sure, that we have had a full representation present to observe the proceedings.

Q. Would it be the same man in each of these meetings?

A. No. Sometimes the Orlando field representative in Florida is present, or he sends his assistant. At times these meetings are attended by Mr. M. F. Miller, as the Florida field representative of the Department of Agriculture, Marketing Division, and his assistant, Mr. W. R. Cleveland, has attended meetings in his place at times.

Q. Do you have any personal knowledge of what happens in Washington after these recommendations are sent there?

A. No, sir.

Mr. Ferguson: That is all.

And further deponent saith not.

(Adjournment to 9:30 A.M., January 22, 1958.)

[fol. 92] Resumed at 9:30 A.M., January 22, 1958.

Appearances: Same as heretofore noted.

Dr. Roy W. Harkness, a witness on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Dr. Harkness, will you please state your name in full?

A. Roy W. Harkness.

Q. Where do you live?

A. I live in Homestead, Florida; Route 1, Box 426.

Q. What is your profession?

A. I am a chemist with the Sub-Tropical Experiment Station.

Q. Are you classified as a plant chemist?

A. No; I am listed as an associate chemist there.

Q. In what field of chemistry?

A. I have been working in various fields. I have been working some on plant nutrition, and also have been working on the maturity of avocados and mangoes.

Q. What has been in general your training and experience?

A. Previous to coming to the Experiment Station?

Q. Yes; going back even to your school days.

A. Well, I got my Ph.D in Physical Chemistry at the University of California in 1928. I worked for the Department of Agriculture in Washington on Catalysis Research, [fol. 93] in the research laboratories of fixed nitrogen. I worked there until 1935, I believe, and then I worked for the Houdry Products Corporation of Pennsylvania, in their research department, until 1946, and since that time I have been at the Experiment Station down here.

Q. Is this an Experiment Station of the University of Florida?

A. Yes, it is.

Q. What is your position there?

A. Associate chemist at the present time. I started as an assistant chemist.

Q. And you have been at this Experiment Station how long?

A. Twelve years now.

Q. Are you a member of the faculty of the University of Florida?

A. Technically, yes.

Q. You have already indicated that you have engaged in research work on the subject of maturity of Florida avocados?

A. Yes.

Q. What was the purpose of that research?

A. The original purpose was to try to find some means of indicating when the avocados would mature.

Q. You were seeking a scientifically valid method of determining maturity?

Mr. Fourt: I object to the question as leading.

The Witness: Yes.

[fol. 94] By Mr. Ferguson:

Q. Doctor, was this research project of the University of Florida, to which you have referred, given some designation by number?

A. Yes. It started originally before a number was given to it, but after we had been working on it for some time we wrote up a project statement and it was given a number at that time. I will have to look up the number, if you wish to know the number.

Q. It would be convenient to have it, Doctor.

A. The number is 675.

Q. When did this research which you undertook on the subject of maturity of Florida avocados begin?

A. I believe it started in the fall of 1951.

Q. At whose request was it initiated?

A. Well, it was partly on our own consideration of the need of it, and partly on our own consideration of the Experiment Station, and also at the request of avocado packers and growers.

Q. Where was the research carried on?

A. At the Experiment Station.

Q. In this research project, did you give consideration to the measure of oil content of the fruit as a possible standard of maturity?

A. Yes, we did.

Q. What experimental work, if any, did you do with reference to the oil content of Florida avocados?

A. That was the principal part of the research at first. [fol. 95] We started out by measuring the oil content of avocados at various times through the season, starting at a time at which we thought they were still immature, and continued on through the period in which the various varieties were picked for the market.

Q. In what years were those oil content tests made?

A. Every year from the fall of 1951 on we made some oil content tests.

Q. These oil tests were all made at the Sub-Tropical Experiment Station?

A. Yes.

Q. Where and how were the samples obtained?

A. They were obtained from various groves throughout Florida. Some was fruit grown at the Experiment Station, and quite a portion was from various commercial groves in and around Dade County, and very few from groves in other parts of the State.

Q. In general, Doctor, when were these oil content tests made in relation to the time of the picking of the fruit?

A. In a large proportion of the cases, sir, they were made on the same day, or they were made within two days after picking, excepting in the case of certain special investigations which we were making as to the oil content, they were made within two days after picking. In other words, aside from these special investigations, the oil content tests were made within two days after picking, and usually on the same day.

Q. What method did you use to test the oil content?

[fol. 96] A. We used exactly the method used in California, with the halowax oil and the shaker bomb.

Q. What equipment did you use?

A. We used the shaker bomb, and we used the refractometer for getting the refractive index, and also miscellaneous laboratory equipment.

Q. Do you know where you got the equipment?

A. The refractometer was gotten from one of the chemical supply houses, one of the main chemical supply houses here, and the shaker was bought from a firm in California which makes shakers out there. I have forgotten the name of the company.

Q. Did you keep a record of these oil tests?

A. Yes, we kept a record of all of the oil tests.

Q. Do you have that record here?

A. Yes. That record is in these two books where these papers are placed in the books. These are the original records.

Q. Do you have a typewritten copy?

A. Of many of them, but not all of them. All of the original records are in these two books.

Q. Would you please add to your last answer a statement of the page numbers in the books? Possibly you can do that better than I can.

A. Here is one book which I have designated as number 7.

Q. Book number 7?

A. Yes. Starting on page 30, we have data for 1955, [fol. 97] starting in November. On page 32, we start with October, 1956, and we run over to page 89.

Q. Continuously from page 32 to page 89?

A. No, they are not continuous. They go over to page 46.

Q. Pages 32 over to 46?

A. That is right. That is December, 1956. On page 50, we start in with July 13th, 1953, and over to page 90, which is January, 1954.

Q. You mean that page 90 begins 1954?

A. It ends on January 2nd. On the same page I started in with June, 1954, being page 90.

Q. Do you have more pages there for 1954?

A. Yes, over to page 95, which is October, 1954. Then it is continued on page 110 over to page 123, which is January, 1955. On that same page I start in with May, 1955, there being just one page there. Then over to page 126, which is June, 1955, to 129, which is November, 1955.

I will start now with the next book, book number 8. In my book, book number 8, on page 78, I have October, 1957, to page 80, being November, 1957.

Q. Doctor, I didn't catch anything for 1952.

A. Apparently I don't have those in these books; apparently 1952 is in other books.

Q. You have it in some other form with you this morning?

A. I have some typewritten results, yes.

[fol. 98] Q. May I see those?

A. Yes. Here is a typewritten summary of some of the 1952 data.

Q. You have handed me seven typewritten pages. What is recorded on these seven pages, in general, Dr. Harkness?

A. In general, sir, it is a comparison of the oil content of different fruits on the same tree, of different trees in the same grove, and of different groves. Some of them are the Lula variety and some of them are the Booth 8 variety.

Q. Are the entries on these typewritten pages taken from book records such as books 7 and 8?

A. Yes.

Q. But they are not as comprehensive as in the books?

A. No.

Q. Are there other matters reported in these books, numbers 7 and 8, and similar books, of the Experiment Station?

A. Yes, there are other things recorded in them. Book 7 is entirely on avocado research, and book 8 is on mango research, as well as avocado research.

Q. That is a rather helpful statement, Dr. Harkness. Book 7 relates to avocado tests only.

A. Book 7 all relates to avocados, but not all of the pages relate to oil content tests. There are a few pages on leaf analyses, and there are twenty pages on respiration studies of avocado fruit.

[fol. 99] Q. You have already designated the pages which contain the oil content tests?

A. Yes.

Q. Now I will ask you the same question as to book number 8. Are the only pages in that book which record oil content tests, pages 78 to 80?

A. Yes, I believe so. Most of the rest of the book is on mango maturity work.

Q. May I again see the typewritten pages?

A. Yes.

Q. To what years are the entries on the typewritten pages limited?

A. 1952, 1953 and 1954.

Q. Three years?

A. Yes.

Q. Let me ask you this question, Dr. Harkness: If we are permitted by you to make photostatic copies of the pages which you have indicated in these two books, with the books being returned to you during the day or at least by tomorrow, would we then have a record of all of the tests made in the years beginning 1953?

A. Yes.

Q. And then if we took the entries for 1952 on the typewritten pages, likewise to be photostated and returned to you, would we have a complete record; is that correct?

A. You would not have all of the record pertaining to [fol. 100] 1952, the early part.

Q. We would only have part of 1952?

A. That is right. You would have a large part of it, but not all of it.

Q. And the 1953 and 1954 entries in the typewritten form would be a duplication of what we found in books 7 and 8?

A. That is right.

Mr. Ferguson: Now, with leave of the witness, I propose to have photostats made of the pages indicated in books 7 and 8, and for simplification, although I realize that there is some duplication, including the seven typewritten pages, all of which have been marked collectively as plaintiffs' exhibit 16 for identification—in other words, when the photostats are obtained I propose to offer the photostats in evidence. All I am asking of counsel now is an understanding that no objection will be made on the ground that we are using photostats.

Mr. Fourt: No objection will be made to the use of photostats, but we are not stipulating that they may be introduced in evidence.

By Mr. Ferguson:

Q. Now, Dr. Harkness, what was your personal part in the making of these oil tests?

A. In some cases, particularly with the early ones, I made the determinations myself. Later on, I supervised them.

Q. That applies to all tests recorded in these books?

A. They were all made under my supervision.

[fol. 101] Q. And do you say that they are true and correct?

A. Yes, to the best of my knowledge.

Mr. Ferguson: Now, Mr. Fourt, if you wish to examine on voir dire at this point, you may do so.

Mr. Fourt: May I see books 7 and 8, as well as the seven typewritten sheets?

Mr. Ferguson: You certainly may.

Mr. Fourt: Rather than interrupt at this time to examine on voir dire, could we defer that until the time for cross examination?

Mr. Ferguson: Yes.

By Mr. Ferguson:

Q. Dr. Harkness, did you in each of the years 1952, 1953, 1954 and 1955 publish any Florida Agriculture Experiment Station reports and statements of the nature of your studies on State Project 675, and your conclusions or tentative conclusions?

A. Yes, I did.

Q. Do you have with you copies of those volumes for the four years I mentioned?

A. Yes, I do.

Q. Will you please check these page references and see if they are correct? Your 1952 report is at page 287?

A. Correct.

Q. Your 1953 report is at page 329?

A. Correct.

[fol. 102] Q. And your 1954 report is at page 292?

A. Correct.

Q. And your 1955 report is at page 315?

A. Correct.

Q. Now, Dr. Harkness, will you please tell us what observations you made in the course of this research project regarding the oil content as a standard of maturity for Florida avocados?

A. Well, the observations I made are written up in these reports.

Q. We must hear them from you, Doctor.

A. Well, do you want me to read them?

Q. If necessary to refresh your recollection.

Mr. Fourt: To which we will object. This is the type of matter that we feel we should make objection to at this point. Reading of the material into the record of course does not obviate our objection to their materiality.

By Mr. Ferguson:

Q. I am not asking you, Dr. Harkness, merely to read the report. I am asking you to now state your observations, and in the course of your statement you are at liberty to refer to any papers that will help your recollection. I take it that your answer will be predicated upon your own recollection.

A. Several observations were made in regard to the value of oil content. One was that several of the earlier varieties matured to a satisfactory quality as judged by the people [fol. 103] who eat them at a point at which time the oil content was in the range of three to six percent.

Later in the season the lafe maturing varieties did not reach or approach edible condition, as judged by the people who ate them, until the oil content was comparatively high, perhaps seven to eight percent, or even higher. In other words, the quality of the avocado, as judged by the people who ate them, did not correlate with the oil content when you consider all of the different varieties together. In other words, the early varieties would begin to attain maturity before the oil content ever reached a high value. I don't want to be exact on this without looking at the book, but I believe the book will show that the Pollocks showed an oil content of five percent. The Waldins did not reach eight percent, let's say, until December, which is the normal time for picking Waldins.

In our research work we made it possible that the real measure of maturity was the quality of the avocado as judged by the people who eat it.

We were not looking for any particular food value; it was just a matter of having a fruit which was enjoyable to eat and at the same time one which would have a satisfactory food value. There was no attempt to arrive at a measure of the value of the fruit based upon the number of calories or anything like that.

Aside from that, we ran into serious difficulty in using oil content as a measure of maturity because of the variability [fol. 104] of oil content we found in different fruit.

Then on the same tree fruit picked at the same time would vary a large amount. The fruit would look alike and would be off of the same part of the tree, but when the oil content was determined there would be a three percent difference in the oil content; for instance, one fruit might contain six percent and another nine percent, off of the same tree. There was no correlation that we could find between the variation in oil content and the flavor of the fruit.

If we took an average of ten fruit from a given tree, we would get a certain value which we could duplicate fairly

well, and if we took ten more fruit from the same tree, and compared them with the other ten as to oil content, sometimes we would find a measurable difference between the two trees, even in the same grove. Then if we averaged up the different values taken from the different trees in the same grove, on the same variety, and compared those with similar averages obtained in another grove, we might then get different values in the other grove. In other words, we couldn't observe any difference in the eating quality of the different fruits or different values from the different groves. While admitting that we didn't actually run any taste panels to afford conclusive proof that the flavor was the same, we did observe, from two or three observations, that they didn't show any taste variation.

Q. You mean difference in flavor?

[fol. 105] A. Yes, in spite of the difference in oil content. These variations between different groves were sometimes very great. For example, in this typewritten data, which has already been submitted here, but which is also given more emphasis in the annual report,—just glancing at that data here, you will see certain observations. To illustrate, from one block of trees at the Experimental Station, the Lula variety, around the latter part of November, ran around ten to thirteen percent oil. The oil variation in another block of trees at the Experiment Station, at that same period, ranged from six to nine percent oil.

Q. Dr. Harkness, incidentally, how is the station grove designated in the record?

A. One is designated as block 9, and these block numbers refer to ten acre blocks. As I said, one is block 9, and another is block 5. It so happens that in the case of these Lula trees, the block 9 trees are much younger than those in block 5. The block 5 trees are quite old, twenty years or more, and the block 9 trees are less than ten years old.

Q. Was there any variation corresponding with the age of the trees?

A. We didn't find that constant variation in other groves. It so happened that these two groves were different, and it so happens that they were of different age, however, we drew trees of different ages from commercial groves, and we failed to find such a constant variation.

[fol. 106] Q. Doctor, if I may inject this question, did all of these trees in the station groves receive the same treatment in the way of fertilizer?

A. The fertilizer program was very nearly the same, and the spray program, to the best of my knowledge, was identical. One of these groves, block 9, was a grove where limited fertilizer tests were being run, and certain trees received an application of magnesium, and certain others didn't receive it; however, those two treatments showed no difference in the oil content.

Our general conclusion about oil content as a method of measuring maturity of avocados was that it would be very difficult to apply on account of these variations between different fruits and different trees in different groves, which we had no way of explaining, and to the best of our knowledge did not correlate with the quality of the fruit.

Q. That would be within the same variety?

A. Yes.

Q. Of course if the question is broadened, do you have an opinion whether a fixed percentage of oil content is a scientifically sound standard for maturity of all varieties taken together?

A. Well, it seems to me that it is not scientifically sound to use one measure for varieties of any kind of fruit that varies as much as the different varieties of avocados.

Q. In addition to State Project 675, and particularly in the years 1954, 1955, 1956 and 1957, were oil tests of [fol. 107] avocados made at the Sub-Tropical Experiment Station by you or under your supervision upon application by growers and handlers of avocados in Florida?

A. Yes, they were.

Q. Were those limited to any particular area?

A. No. Our policy was to make oil determinations in limited number for any grower or packer who brought the avocados into us.

Q. Did you make a record or cause one to be made of these oil tests?

A. Yes, they were all recorded in these books.

Q. Are they included in these books 7 and 8?

A. Yes, they are included on the pages which you already have.

Q. Is it indicated in the record in each instance who applied for the oil tests?

A. The designation in the book is either the person who brought the fruit in or the grove from which the avocados came.

Q. Are these records of each test segregated some way in the book?

A. Only by date. There are six or seven by date.

Q. Can you tell us on what pages we would find them?

A. They are on some of these pages which you already have. As a matter of fact, they are listed chronologically by year. For instance, all of these in book 8 were run at the [fol. 108] request of someone else, and all of those in the year 1956, as well as 1955. Prior to 1955 some were requested at times and others were for our research program.

Q. Doctor, if you will please look at these pages which are marked for identification as plaintiffs' exhibits 12 and 13—

A. I have seen copies of those. I think I have copies here.

Q. Have you had an opportunity to compare the entries on these exhibits with the entries in your book?

A. Yes, I compared a few entries on each of these pages with entries in my book, and in each case where I compared them they checked.

Q. Do these exhibits, plaintiffs' exhibits 12 and 13 for identification, correctly list the oil tests applied for by Florida Lime and Avocado Growers, Inc. and by Mr. Kendall, of South Florida Growers Association, Inc.?

A. As far as I checked them, they are correct and represent what they say.

Mr. Ferguson: I will now state to counsel that upon the testimony of Dr. Harkness exhibits 12 and 13 will be offered in evidence.

By Mr. Ferguson:

Q. Just one other question, Dr. Harkness: Were these tests to which you have been testifying composite tests of a number of fruit studies or simply separate tests of the individual avocados?

[fol. 109] A. In nearly all cases, but not all of them, they were composite samples of several fruit and the number is designated here on the sheet.

Q. So that the resulting percentage represents then the average of the number of avocados forming the sample in each instance?

A. That is right.

Mr. Ferguson: You may cross examine.

Cross examination.

By Mr. Fourt:

Q. Dr. Harkness, who is your immediate supervisor at the Experiment Station?

A. Dr. George D. Reuhle.

Q. What is his title?

A. I think he is director of the Station.

Q. I take it, Dr. Harkness, that your salary is paid by the University?

A. Yes.

Q. With respect to the avocado maturity studies at the Experiment Station, when did they first begin, approximately?

A. Approximately in 1951.

Q. Were you engaged in that experiment at its inception?

A. Yes.

Q. Dr. Harkness, I show you your book number 7, at page 30, and ask you if you have any personal knowledge as to the source of the sample which is on the top of the [fol. 110] line where the "Weight" is 1784?

A. You mean the source of the fruit?

Q. Yes. I mean personal knowledge to you as distinguished from what someone may have told you.

A. I didn't see the fruit when it was brought into the laboratory.

Q. Insofar as source of that particular sample is concerned, you would have to rely on what someone told you?

A. Yes.

Q. Would that be true of all of the fruit covered in all of the tests indicated in books 7 and 8, and also in the mimeograph sheets?

A. No, not all of them. It is not true of the ones that were taken for research purposes. I would have to check through to tell you which ones it is not true for, but much of that fruit I do have personal knowledge of.

Q. Is it true that the fruit of which you have personal knowledge as to its source, would be the fruit that came from groves 5 and 9 at the Experiment Station?

A. It would include those, yes.

Q. Doctor, I show you plaintiffs' exhibits 12 and 13 for identification, which purport to be copies of entries in your books 7 and 8; is that correct?

A. Yes.

Q. As to those samples where the tests were made at the [fol. 111] request of South Florida Growers Association, Inc., which is shown on plaintiffs' exhibit 13 for identification, would you have personal knowledge of the source of that fruit and the conditions under which it was picked?

A. In most cases, sir, I did not see the fruit until it came into the laboratory.

Q. Could you say that that would be true in ninety percent of the cases as to the fruit submitted to you by South Florida Growers Association, as shown by plaintiffs' exhibit 13 for identification?

A. Yes, I believe that would be true regarding those pages.

Q. With respect to the first entry on the top of plaintiffs' exhibit 13 for identification, I note that the grove is denoted "Chandler".

A. Yes.

Q. Do you know the acreage included in that grove?

A. No, I do not. Chandler has several groves. I don't know which grove this came from.

Q. Do you know how many trees there were in the grove from which that fruit was a sample?

A. No.

Q. Turning to the sixth item on the first page of plaintiffs' exhibit 13, denoted "English" grove,—do you know how many acres are in that grove?

A. No.

[fol. 112] Q. Do you know the number of trees per acre of the English grove?

A. Not specifically, but I know the general planting scheme around through the area.

Q. In that area?

A. Yes, I would say I know it approximately.

Q. But you could not at this time give a correct figure as to the number of trees?

A. No.

Q. Dr. Harkness, as to the English grove, do you know whether the five samples which are shown there were selected at random from the grove?

A. All I know is that we gave directions to all of these people who were in the habit of bringing samples in to select them at random. I have no personal knowledge, however, that they did so.

Q. Do you know what relation these five samples had to the total number of trees in the English orchard?

A. Since I don't know the size of the grove, I couldn't give you that answer.

Q. Doctor, are you acquainted with the Latin-square method of sampling?

A. I am vaguely familiar with it. I never used it myself.

Q. I take it that you are familiar that the Latin-square system is a system of dividing the area of an orchard into [fol. 113] small squares?

A. Yes.

Q. Did you give instructions to Mr. English or to the person responsible there to divide the orchard by the Latin-square method or any other method to insure that the samples selected would be at random?

A. No.

Q. Do you know whether that was done, of your own knowledge?

A. I think it is safe to say that I don't know.

Q. Did you give any instructions with regard to the size of the samples that Mr. English should bring in?

A. Yes.

Q. What were those instructions?

A. The instructions in general that we always gave them was that there should be at least five fruit.

Q. Would that instruction as to the five fruit apply regardless of the size of the orchard from which the samples were taken?

A. Yes.

Q. Do you have any knowledge as to whether these samples could be considered orchard-run fruit or whether they were selected fruit on the basis of quality?

A. I don't know.

Q. Of your own knowledge, with respect to the English [fol. 114] grove, do you know whether enough samples were taken to account for variations between trees in the grove?

A. No.

Q. Did you give any instructions that such a factor should be taken into account in selecting the number of fruit and the selection of the trees from which the fruit was to be taken?

A. The only instructions we gave was that there should be at least five fruit and that the fruit should be selected at random.

Q. Do you have any personal knowledge with respect to the five samples which appear to have come from the English grove, as noted on plaintiffs' exhibit 13, as to the actual date the samples were picked?

A. The only knowledge we had was that we would take the word of the person who brought the fruit in to the effect that it was picked on the date he said it was.

Q. Is it true that your answer would be the same as to all of the samples and all of the groves listed on plaintiffs' exhibit 13, if I asked you the same question with regard to your personal knowledge as to the picking date, the source of picking, the size of the grove and the number of trees per acre?

A. In most cases, yes.

Q. Would it be fair to say that it would be true in at least ninety-five percent of the cases?

A. I believe so.

[fol. 115] Q. Isn't it true for your purposes that these factors that I have described, such as the sufficiency of the sample, whether it was picked at random, or the grove from which picked,—would be immaterial for the purposes for which you were making the tests?

A. The only purpose we were making the tests for was to give the person who brought the fruit in an indication of the oil content of the fruit, and that information did not

personally apply to us because we were not going to use the data for ourselves.

Q. Then insofar as your tests were concerned, the tests showed only the oil content of these five fruit when measured according to your techniques?

A. Yes.

Q. With respect to the English samples, which appear to be five in number and which appear on plaintiffs' exhibit 13 for identification, do you have any personal knowledge as to how long the fruit was retained by Mr. English or his employees prior to the time it was given to you or someone at the laboratory?

A. No.

Q. Would your answer be the same if I asked the same question regarding all of the rest of the samples and groves which are listed on the several pages of plaintiffs' exhibit 13 for identification?

A. It would be true in most cases.

Q. If I asked the same question of you regarding your [fol. 116] personal knowledge of the picking date and the conditions under which the samples were selected, the size of the orchard and the length of time the grower retained the samples after picking before delivering to your laboratory, would your answer be the same as to the tests as indicated on plaintiffs' exhibit 12 for identification?

A. Yes.

Q. Is it true, Dr. Harkness, that your research project on maturity ended in 1954?

A. No. Insofar as oil content goes, it ended in either the end of 1954 or January of 1955.

Q. At the latest it ended in February of 1955?

A. As far as oil content goes. I did some other work on maturity on another angle the next season.

Q. That would be perhaps on density?

A. No; it was on respiration work.

Q. Subsequent to February, 1955 the oil tests were made at the request of the various members of the industry who would send in samples to you?

A. Yes.

Q. And these oil tests were made as general information to the industry rather than as a part of a specific project at the Experiment Station?

A. Yes.

Q. With respect to the fruit which you sampled as a part [fol. 117] of your research project in 1954, Dr. Harkness, did you personally go out and supervise the picking of the fruit in groves 5 and 9 at the Experiment Station?

A. Yes, I did. As a matter of fact, I picked it myself in most cases.

Q. So as to those tests then you would have personal knowledge from the time of picking clear through the testing?

A. Yes.

Q. As a part of the 1954 research project did you request the industry or members thereof to furnish you with avocado fruit?

A. I believe so. I did in two or three seasons, and I believe 1954 was one of them.

Q. As to the samples which did not come from the Experiment Station groves, did you have any personal knowledge as to the manner in which the samples were selected?

A. Yes. I went to the groves and picked them myself.

Q. Then so far as the research project is concerned, you had personal knowledge as to the selection of the samples and the following of the samples through the laboratory where the tests were made of the samples?

A. Yes.

Q. Dr. Harkness, I show you plaintiffs' exhibit 12 for identification and ask you to look at the top line on page one and state if you can recall now whether you personally selected the five samples from the Piowaty grove?

[fol. 118] A. I don't remember selecting them.

Q. Is it possible that in the alternative you could have personally selected them or is it also possible that Mr. Piowaty or his representatives may have selected them?

A. In all probability they picked them because it was five fruit, whereas if I had selected them for research work, I would have picked ten.

Q. Is it true that on page four of plaintiffs' exhibit 12 for identification that if none of the size samples shown were "ten",—would that indicate that you personally selected none of those samples?

A. That is right.

Q. Then it would also follow, would it not, Dr. Harkness, that none of the samples tested, as shown on page four of plaintiffs' exhibit 12 for identification, would appear in the results of your research project?

A. That is probably correct.

Q. Now, Dr. Harkness, I show you the first page of plaintiffs' exhibit 13 for identification and ask if you presently remember whether you personally selected the samples shown as coming from any of the groves on that page?

A. I don't remember personally selecting them at all.

Q. On page one of plaintiffs' exhibit 13 you indicate ten samples from Kinard's grove. Is it possible that you personally selected that sample in the orchard?

[fol. 119] A. No, I never took any samples from Kinard's grove.

Q. There is indicated on page one of plaintiffs' exhibit 13 for identification five samples from the McMillan grove and eleven samples of Booth 7s from "Blank" grove. Is it probable or improbable that you personally selected those samples?

A. It is improbable.

Q. It is improbable that you personally selected any of the samples shown on page one of plaintiffs' exhibit 13 for identification?

A. Yes.

Q. Is it not also true that the results of the oil tests from samples shown on the first page of plaintiffs' exhibit 13 for identification were not shown in the results of your research project during 1954-55?

A. Yes.

Q. Now, Dr. Harkness, I show you page 78 of your book number 8, and ask you if you can identify for the record the approximate dates when the tests on that page were taken?

A. There were two on October 6, 1957, two on October 8th and several on October 16th, and so on.

Q. And what is the latest date shown there?

A. The latest date on this page is November 1st.

Q. With respect to the sample tests as shown on page 78 of your book which has been marked number 8, do you have any personal knowledge as to the conditions under which [fol. 120] that fruit was picked in the orchard?

A. No; it was brought to the laboratory for testing.

Q. Then is it true that as to the samples shown on that page, Dr. Harkness, that the only knowledge you would have would be knowledge given to you or your associates at the time of the delivery of the fruit to the laboratory?

A. Yes.

Q. With regard to the fruit shown on page 78 of your book 8 was the diameter of that fruit measured?

A. No, but it was weighed.

Q. And what terms of weight were used?

A. We used the composite sample, weighing the composite sample.

Q. At the time of weighing was the weight in grams translated into ounces?

A. No.

Q. During the tests made at the request of members of the industry did you ever have occasion to translate the weight shown in grams to weight shown in ounces?

A. Occasionally.

Q. For what purpose did you want to translate it into ounces?

A. So that the growers would know what the size was in ounces.

Q. Then the weight was translated for the convenience of [fol. 121] the growers and the packers?

A. Yes.

Q. With respect to the fruit which is represented by the entries on page 78 of your book, do you recall whether any of that fruit was covered by a Federal-State Inspection Certificate?

A. No, not when it was brought to us, that is, insofar as I know.

Q. Then so far as you know it had never been inspected?

A. That is right.

Q. Dr. Harkness, with respect to the fruit which is represented by the entries on page 78, what source of information did you rely upon in labeling or identifying the varieties of that fruit?

A. In most cases we could recognize the varieties ourselves.

Q. Would that be true of the principal varieties?

A. Yes.

Q. Would it be true of some of the lesser well known varieties in Florida?

A. There are some varieties that we at the Experiment Station may not be able to identify by mere inspection.

Q. Doctor, for example, would you yourself or people at your station be able to identify a Booth 1 variety from a Booth 3 variety?

A. Yes.

Q. Doctor, I wish to show you a copy of an avocado [fol. 122] shipping schedule, of which I am somewhat ignorant. Perhaps you could list some varieties here which are not too well known and which perhaps yourself and members of the Experiment Station could not readily identify?

A. I do not see any point in doing that. I prefer to tell you the ones that I could identify.

Q. Doctor, as a favor to me, will you please describe the varieties which you and your staff would have difficulty in distinguishing from one another?

A. I can pick a few out here; for instance, the Nadir, the Nirody, the Vaca, Avon, Blair, Booth 10s, Booth 11s, Ajax, Sherman, Dunedin, Byars #1—I think we would have some difficulty with those varieties as to identification.

Q. Isn't it true also that perhaps some of the experienced men in the industry, should we say, who deal with these varieties every day, Dr. Harkness, would have no difficulty in distinguishing these varieties?

A. Possibly; I don't know.

Q. As to the varieties you have just named, Dr. Harkness, upon what source of information did you rely in making the entries in your books 7 and 8?

A. That probably never came up, because these varieties were never brought in to my knowledge.

Q. Is it true that subsequent to January or February of 1955 that you would not have personally made the tests [fol. 123] which are reflected in books 7 and 8 and in the mimeograph sheets?

A. That is correct.

Q. Would you have been personally present in the laboratory room when the person on your staff made the tests in all cases?

A. Not in all cases, but in some cases I would have been present.

Q. During the period of time from January of 1955 until December 10th, which is the latest date shown on plaintiffs' exhibit 12 for identification, what would be the total number of workers in your laboratory who would have made these tests acting under your supervision?

A. Two.

Q. Who would those persons have been?

A. Mrs. McKee and Mrs. Kelp.

Q. As to the tests made by either of these two ladies, which were not made in your presence, how would you know as to whether or not their technique was perfect or whether they made errors?

A. I know that they were trained to run the tests, and I know that they knew the technique. I don't know that they applied the technique or not, because I wasn't there at all times.

Q. You presumed that they followed the correct technique?

A. Yes.

Q. However in those occasions where you didn't observe them, you couldn't personally warrant that they did follow [fol. 124] the proper technique?

A. No.

Q. Is it possible that you personally observed them make five percent of the tests covered by plaintiffs' exhibits 12 and 13 for identification?

A. Yes, I would say that I did.

Q. What would be the maximum percentage of the tests that you personally observed?

A. I would hesitate to estimate that.

Q. Perhaps ten percent?

A. I don't know; possibly that is correct.

Q. But certainly less than twenty-five percent; is that correct?

A. I am not sure.

Q. As a matter of fact, you would have no purpose in standing over their shoulders to see them conduct the tests, would you?

A. I know that they are capable workers, so that wouldn't be necessary.

Q. Doctor, I show you an unidentified series of papers marked at the top "1955 Progress Report", and ask you if you can state for the record who typed these pages?

A. You say "unidentified". The first page seems to be page number two. Page one for some reason is missing. The heading is "Annual Progress Report for the Year [fol. 125] 1955." Apparently the stenographer didn't put her initials on this progress report, so I don't know.

Q. Then you have no personal knowledge as to who typed that report?

A. No.

Q. Is it true, Dr. Harkness, that this report would have been typed from some kind of rough notes made in the laboratory?

A. They were not too rough; they were copied out very carefully.

Q. Do you have any personal knowledge as to whether this typewritten report is a true and correct reproduction of the original handwritten notes?

A. Yes, because I proof read these.

Q. Doctor, I show you page 126 of your book designated number 7, and ask you about item number twelve thereon. Does item number twelve reflect the palatability or taste of the fruit covered by that entry?

A. Apparently it does.

Q. You say apparently. Is that your handwriting there?

A. Yes.

Q. Then at this moment you don't recall the exact circumstances underlying that entry; is that correct?

A. I know that at that time I was running some tests to see how the fruit ripened when picked. My notes are not too full here, but it is evident that the fruit was picked on [fol. 126] September 29th, and the oil content test was run on—oh, I remember now. I picked ~~a lot of fruit~~ on September 29th and ran several oil content determinations on that same day, and then I ran a couple more oil content tests later, a couple on October 10th, on the same fruit; some tests were run on October 7th and some on October 10th. In the period from October 7th to October 10th the fruit became ripe and was tasted at that time.

Q. Who did the tasting?

A. I did myself. I don't remember whether anybody else did or not.

Q. What criteria did you use for palatability?

A. Just my own "feeling".

Q. Do you have any personal attitude or feeling towards avocados which indicates to you when you like avocados and when you don't like avocados?

A. Yes, I do. As I stated before, any investigation of that kind should require a panel test.

Q. Is it true that other persons in other parts of the United States might have different tastes for avocados?

A. Yes.

Q. Directing your attention back to item twelve on page 126 of your book designated book number 7, did you make an oil test on the precise sample which you tasted?

A. No.

Q. Then is it true that you made oil tests on fruit picked [fol. 127] at the same time as the fruit that you tasted?

A. Yes.

Q. Directing your attention to your results of the 1954 55 research project, did these tests show that for any given individual variety of fruit which you tested that the oil content increased as the season progressed?

A. Yes, that was the general result, the general indication that we found.

Q. To the best of your knowledge, Dr. Harkness, at what point of the season in terms of months would the Lula variety, considering a ten-fruit sample, average an eight percent oil content? In your opinion if the fruit had been picked in December and ten samples taken from it of the Booth 8 variety,—would those samples have averaged in excess of eight percent oil content?

A. Many of them would, but not all.

Q. The Booth 8 variety, as in the case of all varieties, has an oil-variation?

A. Yes.

Q. And is it true, Dr. Harkness, that variations from the same orchard might run as low as three percent?

A. Yes.

Q. Would you say that it would run higher than three percent?

A. I don't know. In special cases it might, but not usually.

[fol. 128] Q. Would you say that it is a satisfactory fruit if the variation is within a range of three percent?

A. In a given grove, yes.

Q. Were any tests made of the same size fruit in any variety, whether Lula, Booth 8s or other varieties taken from different groves?

A. Yes.

Q. What was the variation of oil content as between samples of the same size picked under these circumstances?

A. This data here shows a variation up to thirty-six percent.

Q. What was the variation in the majority of the cases, Dr. Harkness?

A. I don't know. I couldn't say what the average would be.

Q. Would the average be somewhere between zero and six percent?

A. Since I have not seen them more than six percent oil content, that is probably correct.

Q. Using a variation of six percent, is it true that that would mean a three percent variation below or above a certain mean line?

A. Yes.

Q. For instance, if the range of variation was six percent, and that median line was eight percent, then it would be three percent above and below eight percent?

[fol. 129] A. Yes.

Mr. Fourt: Mr. Ferguson, I have a considerable body of cross examination yet, so I would suggest that we adjourn for lunch.

AFTERNOON SESSION

January 22, 1958, 1:00 P.M.

Appearances: Same as heretofore noted.

DR. ROY W. HARKNESS resumed the stand and was examined and testified further as follows:

Cross examination (resumed).

By Mr. Fourt:

Q. Dr. Harkness, in your testimony this morning you used the word "maturity" and the word "palatability". In your testimony this morning did you mean that when the avocado was mature, that it is also at a stage where it will be palatable to the consumer?

A. Not until it has been given an opportunity to ripen.

Q. When you used the word "matured", meaning the time when the fruit should be picked, did you mean after a normal seasoning period that the fruit had reached a degree of palatability satisfactory to the consumer?

A. That is right.

Q. In your testimony this morning when you referred to palatability, were you primarily relying on your own sense [fol. 130] of palatability?

A. I don't understand that question.

Mr. Ferguson: Neither do I.

By Mr. Fourt:

Q. Well, Dr. Harkness, when you referred this morning to "matured" fruit, you qualified it by saying fruit that is acceptable to taste. Were you referring to fruit that you found had a good flavor?

A. Not at that time. I was referring to fruits that were satisfactory to consumers eating them throughout the country.

Q. Referring to your 1954-55 research project, were the palatability tests that were made at that time made by yourself?

A. I am not entirely sure of this, but I believe I am right in saying that during that period Dr. Harding was running palatability tests in Orlando, so we did nothing at Homestead except perhaps myself, and possibly a couple others, may have taken some incidental supplementary tests, but on the overall we depended on Dr. Harding's tests as to palatability.

Q. Insofar as books designated 7 and 8, where palatability tests are entered, were they limited to tests that you yourself made?

A. Either myself or my associates. I don't remember for sure just how many others I had working with me.

Q. On the occasions when your associates made the palatability tests, did you yourself join them in the tests?

A. Yes.

[fol. 131] Q. I refer you to seven typewritten sheets which are headed "1955 Progress Report", and ask you if these typewritten sheets refer to your 1954-55 research project?

A. They apply to it. The data was obtained previous to that, as you can tell from the dates indicated there. This is a tabulation of old data that was in the books but which had not been previously tabulated in typewritten form.

Q. Then these seven pages do not constitute findings on the research project; is that correct?

A. They are findings on the research project, but they were not obtained in 1954.

Q. Do you recall at approximately what time this compilation was made?

A. Some time, I believe, before July 1st, and certainly before August 1st. I know that the progress reports are due in either July or August of each year, so it was before that date in 1955. I believe it was probably three or four months prior to that.

Q. As of the date of this report, Dr. Harkness, this was a summary of the work of the previous year; is that correct?

A. It went back more than the previous year. It went back to 1952.

Q. It was a summary of your work from 1952 to 1955?

A. Not all of it. It was data that had not previously been reported.

[fol. 132] Q. Does the data recorded in books 7 and 8 that you discussed this morning, Dr. Harkness, cover the research project made in 1954-55?

A. Yes, it covers the research project from the first date in book 7.

Q. In addition to that it expressly covers reports of oil tests made at the request of members of the industry independently of your research project?

A. Yes.

Q. Directing your attention to your research project in 1954-55, is it true that you personally picked the samples from groves 5 and 9 for that research project?

A. Yes.

Q. And those were the only two groves from which you selected the samples?

A. No.

Q. What were the other groves?

A. The Kendall grove, the FLAG grove and the Brooks grove. I believe those were the only groves that we selected samples from regularly.

Q. So to the best of your knowledge now there would be six groves from which samples were furnished for your 1954-55 research project?

A. I think they are all I know of now.

Q. From your grove 5 and grove 9, and Mr. Kendall's [fol. 133] grove, FLAG grove, and the Brooks grove, making five?

A. Yes.

Q. Do those five groves complete the list?

A. As near as I can remember now. There may have been some incidental ones, but those five were the main ones.

Q. What is the size of grove 9?

A. Five acres, I believe.

Q. How many trees, approximately, on these five acres?

A. Between three hundred to three hundred fifty, I think.

Q. What is the size of grove 5?

A. Grove 5 requires an explanation. Grove 5 is an experimental grove at the Experiment Station. It is composed of ten acres, and it is composed of miscellaneous varieties. There are about seventy-five Lula trees, about seventy-five Booth 7 trees and about the same number of Booth 8 trees.

Q. Seventy-five Lulas, seventy-five Booth 7s and seventy-five Booth 8s?

A. That is correct. I notice that there is also some Booth 8s that came from another "block". Booth 8s came from block 8. The Booth 7s and the Lulas came from blocks 5 and 9.

Q. What was the principal varieties of avocados grown in block 9?

A. Lulas and Booth 7s.

Q. What is the size of Mr. Kendall's grove?

A. I am not entirely clear on that, but I think it is prob- [fol. 134] ably thirty to forty acres. That is the one just east of the highway there at Princeton.

Mr. Kendall: It is twenty acres of avocados.

By Mr. Fourt:

Q. What would be your estimate as to the number of trees per acre in that tract?

A. I imagine about ninety to one hundred an acre.

Q. And what would be the varieties grown in that grove?

A. He has most everything there. Waldins, Lulas, Booth 8s and Booth 7s. Those were the ones I sampled mainly.

Q. And what is the size of the grove owned by FLAG?

A. That is a ten-acre grove, I believe. I believe it is a ten-acre grove.

Q. And can you estimate the number of trees per acre in the FLAG grove?

A. I would guess about eighty.

Q. And the varieties grown in that grove?

A. That is what we call an experimental grove, so they had a lot of varieties there. They had Lulas, Booth 8s, Hicksons, Halls, and possibly some others that I don't remember.

Q. What is the acreage of the grove owned by Mr. Brooks?

A. Probably about twenty acres.

Q. And the approximate number of trees per acre?

A. Probably close to one hundred.

Q. And the varieties grown there?

A. A lot of different varieties there, too; Lulas, Booth 8s, [fol. 135] Taylors and Waldins. There are other varieties grown there also, but I don't recall them now.

Q. To summarize, Dr. Harkness, is it true that grove 5 or block 5 at the Experiment Station is considered an experimental grove?

A. Yes.

Q. How about block 8 grove?

A. Block 8 is an experimental grove also.

Q. And the Kendall twenty-acre grove—is that experimental?

A. No, that is a commercial grove, and the FLAG is a commercial grove also, but I understand that it was planted for experimental purposes.

Q. What is the distinction between commercial and experimental groves?

A. There is no definite distinction except at the Experiment Station of course we have the trees there for various kinds of experiments, whereas in the other groves presumably the trees are there to make a profit on.

Q. For instance, the FLAG grove, with the several varieties you named,—is that typical of a ten-acre commercial grove in this area?

A. It has more varieties than the typical grove.

Q. Is it also true of the twenty-acre Brooks grove that you have more varieties than typical of this area?

[fol. 136] A. The Brooks grove is an old grove and it is quite typical of old groves to have a large number of varieties.

Q. Then it would not be typical of new groves in this area?

A. New groves usually do not have quite so many varieties, although it is not unusual for a new grove to have as many as five or six varieties.

Q. Is it true that a majority of the new groves will contain one or two varieties of avocados?

A. I don't know for sure, but I know there are many that contain more than that.

Q. Would it be for pollination purposes when they contain more than one variety?

A. Probably.

Q. Is grove 5 at the Experimental Station typical of a ten-acre grove in this area?

A. No.

Q. So far as your sampling is concerned, did you sample all of these groves on the same basis?

A. Yes.

Q. What was that date and how did you select your samples from those groves?

A. We picked out certain trees and designated them for sampling purposes, and then we sampled them at various times throughout the season. In the commercial groves we put tags on the trees so that the regular pickers would leave [fol. 137] the fruit on and we would come in and pick the fruit from those trees.

Q. I take it that these trees were selected deliberately by you in the grove?

A. Yes, they were typical trees, however.

Q. Were they selected at random or did you go into the groves and pick out the trees?

A. They were selected at random but of course we had to select a certain tree in order to—the purpose of tagging them was so that the picking crews would not pick the fruit off of them before we got through picking our samples during the season.

Q. How many trees did you select for sampling purposes on the Brooks twenty-acre tract?

A. I don't remember the exact number, but in general it was about three or four trees of each variety.

Q. And you refer to each variety as the Lula, the Booth 8, the Taylor and the Waldin?

A. Yes.

Q. And I think you included the Booth 7s, didn't you?

A. I got the Booth 7s from another Brooks grove. There are none in that particular grove. Brooks had Booth 7s in another grove.

Q. In selecting the trees from which the samples should be taken in the Brooks tract did you select the trees through a mathematical formula or did you go into the groves and point out the trees?

[fol. 138] A. We went into the grove and pointed them out.

Q. In the Brooks grove, Dr. Harkness, of the four trees you selected, what would be the approximate number of fruit on the individual tree?

A. Oh, I don't know as I counted it, but I would say maybe two hundred to four hundred.

Q. It would be within a range of two hundred to four hundred?

A. That is right. There may be some variation within that range, or some variation outside of that range.

Q. When you visited the orchard, would you take a sample from each of the four trees?

A. Yes.

Q. How many samples would you take off of each of the four trees?

A. It was never less than twenty, and sometimes it was more. I mean to say that the total sample was never less than twenty and sometimes it would be twice that many.

Q. In other words, the samples would vary from twenty to forty?

A. Yes.

Q. Was this figure of twenty to forty selected from the same four trees?

A. No, it wasn't the same number specifically.

Q. As to the individual tree, Dr. Harkness, in what por-
[fol. 139] tion of the tree did you select the fruit?

A. In all portions.

Q. Does that mean that you selected fruit from all portions of a tree?

A. We had a standard picker for picking fruit from the upper part of the tree, and of course we also picked the fruit from the ground.

Q. Is this standard picker a device which cuts the avocados off the tree?

A. Yes.

Q. It is a long pole with a cutter at the top?

A. Yes.

Q. And did you diagram the tree into quarters?

A. No.

Q. Then is it true that the standard in the picking of the samples would depend on the fact that you used the same general plan in selecting the fruit from a tree with respect to all of the groves?

A. We picked the fruit from different parts of the trees, but in no case were we able to find a particular variation of oil content by selecting fruit from different parts of a tree.

Q. Did you find different oil contents in the fruit picked at the same time from different portions of the tree?

A. As I stated previously, we found different oil content from different fruit on a tree, but those different oil [fol. 140] content were not correlated in any way so that we could tell the position the fruit was picked from the tree.

Q. What would be the range of oil content of fruit picked from one tree at one time of the same variety?

A. Usually within three percent.

Q. When fruit was picked from these trees in 1954-55, were different size fruit selected?

A. Sometimes.

Q. Did you have a uniform pattern of selecting different sizes of fruit or did you select just one size?

A. That would depend on what we were trying to show at the particular time. From these typewritten sheets, this typewritten data here, if you will look at them, you will notice that I was taking a uniform size on this page labeled "2". You will notice on this tabulation that ten fruit weighed 9.4 to 11.8 pounds—mostly between ten and eleven point five pounds. At other times we would go to a certain tree and take a sample of each fruit, and then a sample of small fruit, and then make a comparison. At one time we adopted the procedure of taking two samples of twenty fruit each at random, and then lining them up in two samples of ten fruit each, and determining the composite of the ten small fruit; in other words, making two determinations of two composites, ten fruit each.

Q. In your tests where you compared the oil content of the small fruit versus the oil content of the large fruit [fol. 141] picked at the same time, was the range in oil content in excess of three percent?

A. No.

Q. Was it within the range of three percent?

A. Yes.

Q. Was the range of oil content of fruit picked at the same time from the same tree and the same size within the range of three percent?

A. Yes.

Q. So that you could find no drastic major difference as between the different size fruit when picked at the same time?

A. There was a specific difference depending on size.

Q. What was that difference?

A. I have that on another sheet of paper here. I will have to look that up. Here is perhaps the best example of it. It is on page six of this typewritten sheet, which you already have. In this column here you will find the Booth 8 size, and I have listed the size of the large fruit and the size of the small fruit, and the third column there is the difference in size between the large and the small. Then I have listed here the oil content for the large and the small, and as I summed it up I got an average difference of .46 percent oil, or a difference of 112 grams in size, the larger fruit being the higher.

Q. With respect to your 1954-55 studies, Dr. Harkness, during approximately what month of that year would the [fol. 142] Booth 8 variety have exceeded eight percent in oil content?

A. There are a few values here in excess of eight percent. In 1953, I think on December 1, I made one determination of the Booth 8 variety with 8.3 percent oil content, and another one with 9.2 percent oil content.

Q. Would it be reasonable to expect that the oil content of the Booth 8 variety would be increased one month later?

A. It would be reasonable to expect that, yes.

Q. In your 1954-55 project, during approximately what month of 1954 would the Booth 7 variety have reached an eight percent oil content?

A. I don't believe I determined when it would reach an eight percent value. No; I will take that back. I do have some values here of eight percent.

Q. What month?

A. The date is November 20th.

Q. And the oil content, Doctor?

A. It is on page seven here of this sheet. I have some values here from block 9 dated November 20th, averaging 9.2 percent.

Q. During the same research project, Dr. Harkness, during what month would the Taylor variety have reached an oil content of eight percent?

A. Approximately the same time, I would imagine.

Q. Approximately November?

[fol. 143] A. Yes, approximately November.

Q. In this research project did you find that there was an increase in oil content between the time that the same fruit was picked and the time that the fruit had softened, or whatever you call it.

A. We have some data to indicate that the oil content does increase after picking.

Q. Approximately what is the range of that increase?

A. Approximately one percent, except that we ordinarily did not determine the oil content after it was completely softened.

Q. At what point subsequent to the oil test and the time of picking, would you have made the test?

A. Probably as much as five or six days afterwards.

Q. Is it true that the period of five or six days after picking that the oil content of the avocado would increase approximately one percent?

A. On the average, but that is not completely consistent, because in some cases we got a lower value at that time, but on the average it increased.

Q. Is the cause of that increase limited to the amount of dehydration which occurred during those five or six days?

A. The increase was more than the change in percentage due to the loss of that amount of water.

Q. What factors, in addition to the factor of dehydration, would have caused the increase?

[fol. 144] A. I don't know. I am not a plant physiologist.

Q. The person who would work on that would be a plant physiologist?

A. A plant physiologist, a bio-chemist or something of that sort.

Q. Would it be reasonable to expect that both the Booth 7 and the Taylor varieties, which had an oil content in November of eight percent or more, would have had an increase in oil content even more if picked one month later than November?

A. Yes.

Q. Is it also true that the size would increase somewhat if left on the tree from November to December?

A. Yes.

Q. Have you discovered any consistency between the increase in weight and increase in oil content of avocados in this area?

A. The size increase and oil content increase do not increase at the same time, so you can't compare the two and say that they follow together.

Q. Is it true that palatability, oil content and weight will increase as the fruit remains on the tree during the growing season?

A. Yes.

Q. Have you been able to obtain any correlation as to whether these three things, palatability, oil content and weight have any relation to each other?

[fol. 145] A. That is what we have not been able to do satisfactorily.

Q. Dr. Harkness, will different cultural practices affect the same variety of fruit as between different orchards?

A. I don't know.

Q. With respect to size of fruit will cultural practices affect the fruit?

A. Yes.

Q. Are there other factors, of which you are aware, that will affect the size of the fruit?

A. Cultural practices and the weather.

Q. Is it true, Doctor, that cultural practices tend to cause the fruit to increase in size as compared to another orchard which has less satisfactory cultural practices, and that the fruit of the larger size will tend to have a lower oil content than fruit in other orchards of the same kind?

A. We have no correlation of that kind.

Q. Doctor, is it your opinion that the oil tests would be a reliable index of maturity and palatability for a single variety, such as the Lula variety?

A. It is my opinion, sir, that on account of the large variations that one finds in oil content, that we have not been able to correlate with palatability,—that on that account it would be a very unreliable test.

Q. Are you aware of any oil test comparisons with palatability which have been made in the scientific field? [fol. 146] A. The only ones I am aware of are those that Dr. Harding made.

Q. Doctor, in your oil tests which appear to have been made from 1953 to date, what type of oil tests did you utilize?

A. It was essentially the method used in California. We modified the method slightly so as to avoid using the shaker machine which they use.

Q. Doctor, in making these tests will you describe for me the various steps that you utilize from the time the fruit enters your laboratory until you finally make your final rating?

A. The method is described in a paper which I wrote for the Florida State Horticultural Society. I don't know whether you have that here or not, but is described fully in that paper. Do you want me to give it to you in my own words now?

Q. I am afraid so, Doctor.

A. We weigh out a five-gram sample of the fruit. We obtain that sample by means of a core bar. We take a core of fruit from the skin to the side. We take enough of these cores to make more than five grams, and then we cut it so as to have an exact five-gram sample. We put that in a jar, a Waring blender, and add five millimeters of halowax oil and two hundred millimeters of water. We mix that up into a mixture, and we take that mixture and put it in a fifty-millimeter centrifuge tube, and as we centrifuge that material the oil settles to the bottom. We pour the water layer off the top, and the oil remains at the [fol. 147] bottom underneath the skim of the avocados. Then we take a stirring rod and poke a hole in the skim and pour the oil out from underneath it onto a wet glass, and from there we take that oil and run the refractometer index on it, and from that point on the procedure is exactly the same as utilized in California, except that we found it

necessary to add 2/10ths of 1% of oil in order to agree with the results obtained with the shaker.

Q. Dr. Harkness, what in your opinion necessitates or causes the difference between the shaker and the other stuff you mentioned?

A. It could be the solution of the avocado oil in the water.

Q. Is the error the same as between soft and hard fruit?

A. We do not use that method for very soft fruit.

Q. Is that error greater when you use it on soft fruit?

A. I don't know, because it is impossible to make a determination by that method with very soft fruit. We still have the shaker machine to use in cases where we want to make a determination on the soft fruit.

Q. Would you describe this Waring blender?

A. It is an ordinary household mixer, along with a quart jar on a little motor placed on a stand.

Q. Is the Waring blender a standard brand?

A. Yes.

Q. You mentioned something about heating the mixture. [fol. 148] A. No, I did not.

Q. During any portion of this particular process is any of the mixture heated?

A. No.

Q. From the description you have just given me, Dr. Harkness, could another chemist, following this exact description, duplicate your results?

A. Yes.

Q. Would you describe your refractometer index?

A. It is a standard refractometer index. I believe it is called an Abbe.

Q. Is there any provision control temperature on that instrument?

A. Yes.

Q. What is that control?

A. It is a thermostatic control that controls the temperature approximately plus or minus 2/10ths of a degree Fahrenheit.

Q. What is the amount of the temperature setting when you use this refractometer index?

A. I believe it is thirty degrees.

Q. Would that be thirty degrees centigrade, Doctor?

A. Yes. It is somewhat higher than the temperature that is sometimes considered standard, the reason for that being that we wanted the temperature to be above the room temperature, so our calibration was made for that temperature in order that it would be consistent.

[fol. 149] Q. Doctor directing your attention to this Abbe refractometer index; does that instrument you have in your laboratory have a standard index on it which was established for that machine by the factory?

A. Yes, I believe so.

Q. And what is that standard?

A. I don't know. I just haven't worked with it for the last several months.

Q. Based on your memory, Dr. Harkness, would that standard temperature be lower than thirty degrees?

A. Yes, I believe it would be twenty-five degrees.

Mr. Fourt: That is all.

By Mr. Norris:

Q. Dr. Harkness, I would like to ask a couple of questions on a couple of points which are not clear in my mind. When you bring the fruit in from the field do you run the oil test on all of the avocado samples?

A. Yes.

Q. And do you run palatability tests on the same fruit that you run the oil tests on?

A. As I said before, we ran many palatability tests, and very few of those that we did run it was on different fruit. We tried doing some on the same fruit—

Q. Generally speaking, it was your practice to run oil tests on different avocados than you ran the palatability tests on?

[fol. 150] A. Yes.

Q. Do I understand, Dr. Harkness, that your oil content tests were all run within two days after the picking date of the fruit?

A. We were trying to determine the oil content of the fruit as picked. That was true, but in a special investigations on the matter of ripening, we waited longer periods.

Q. Are those special tests so designated in your records?

A. Yes.

Q. How are they designated?

A. There is a footnote on page three of this typewritten sheet here, which I believe explains it all right. For example, I have duplicate determinations made for certain values, and the first value in all cases is the one that runs in one or two days of picking, and the later ones would run at a later time.

Q. Was it your testimony that the size of the avocado could be affected by the cultural practices in a particular grove?

A. Yes.

Q. Could the rate of maturity be so affected by cultural practices?

A. I don't know.

Q. Would it be possible for cultural practices to stimulate the growth of the avocado or in the development of the maturity of the avocado?

A. I don't know.

[fol. 151] Q. But you do have an opinion that normal cultural practices can affect size?

A. There is no doubt about that.

Q. Would you explain your basis for that opinion?

A. It is involved, but certainly if you apply more fertilizer and water you will get a greater growth of fruit. It is not entirely certain that you will get more fruit or larger fruit, but it does either directly or indirectly affect the size of the fruit somewhat.

Q. You also testified that there might be other factors which might influence the growth of avocados, such as weather; is that correct?

A. Weather is one thing, and of course cultural practices include most everything except weather, perhaps.

Q. Does the difference in weather from degree to degree materially affect the rate of growth of the avocados in this district?

A. Very largely.

Q. Is it possible that the rate of growth of the avocados is so easily affected by the various factors that the rate of growth may be different within a given district?

A. I don't know. I would expect that a weather difference in a given district would be an important factor in that respect.

Q. Do you hold a firm opinion on that, Dr. Harkness, or is that just speculative on your part?

[fol. 152] A. The question about weather conditions?

Q. Yes.

A. I would expect that the weather conditions in a given district would be pretty much the same. Of course a freeze would make a big difference. Aside from something like a freeze or a flood or something like that, the temperature variations probably would not make much difference in a given district.

Mr. Norris: I think that is all.

Redirect examination.

By Mr. Ferguson:

Q. Dr. Harkness, you stated on cross examination that the tests made at the Experiment Station in 1955, 1956 and 1957, upon application by growers and handlers, were not a part of research project number 675. Now, then, do these tests have any purpose so far as you and the University are concerned other than to render a public service?

A. Only insofar as they were supplementary to and in confirmation of our previously obtained research work.

Q. You have also stated that the tests considered as a part of research project 675 were concluded at the end of the year 1954. Now, I ask you were the conclusions stated by you at this hearing confirmed by tests made as a part of project 675?

A. Yes.

Q. You were also asked something about your tasting of avocados. For what purpose did you taste any of the avocados?

A. The purpose was to determine if they had reached a [fol. 153] satisfactory degree of maturity for that variety.

Q. Did you taste them to determine if you personally like the flavor of one variety rather than another?

A. No.

Q. Or to determine the state of ripening process?

A. No. They were allowed to ripen until they reached the condition that we thought was the best for that particular fruit.

Q. Then was it to ascertain whether it had attained the flavor appropriate to that variety?

Mr. Fourt: I object to the leading and suggestive question.

Mr. Ferguson: I think the witness has already answered that question. Maybe you are right in your objection.

By Mr. Ferguson:

Q. Did you compare the flavor of one variety with the flavor of another variety?

A. No. We tried to avoid that.

Q. There was a question put to you about a sample of ten Booth 8s tested in December of one of the years you were making these tests, and you were asked if the avocados would likely reach an eight percent oil content or more in the month of December. Did you in your answer give any consideration to marketability of the fruit when it attained an eight percent oil content?

A. No, I gave no consideration to that. As a matter of fact, sir, that fruit was already so matured that it probably would have been difficult to get it to a northern market in [fol. 154] time before it became overripe.

Q. Another question was asked you along the same line, that is, you were asked if the fruit were left on the tree another month or two within a growing season, would it increase the oil content of the fruit. You answered that question in the affirmative. Now, then, Dr. Harkness, if left on the tree after the growing season what is likely to happen to the fruit?

A. Well, it would probably fall to the ground.

Q. Does dehydration increase as time goes on?

A. Yes.

Q. And would it be greater at the end of the two months than at the end of one month?

A. Yes, in some varieties it would be greater, yes.

Q. I direct your attention to a copy of the list of avocado varieties enumerated on plaintiffs' exhibit 9 for identification in this case. Look at that list and tell us of what general horticulture classification are the first eleven varieties included on that list?

A. The first eleven on this list are all West Indian varieties.

Q. And what are the principal characteristics of the West Indian avocados?

A. They have a thin skin and are smooth.

Q. What about size?

A. They have a tendency to be of large size.

[fol. 153] Q. And as to oil content?

Mr. Fourt: I object to the leading and suggestive question.

Mr. Ferguson: I am just trying to direct the attention of the witness to it.

The Witness: They do have a lower oil content.

By Mr. Ferguson:

Q. What is the comparative size of the Booth 8s as against the first eleven varieties named on that list?

A. It is smaller than most of them; in fact, I think it is probably smaller than all of them.

Q. Of what classification are most of the varieties on this list after the first eleven?

A. With the exception of possibly a half a dozen or so, most of them are probably hybrids.

Q. What varieties on this list are grown in the largest volume in Florida?

A. The Lula, Booth 8, Booth 7, Waldin, Booth 1, Hickson, Pollock, Hall, Choquette and Taylor. I am not sure that these are all in proper order, but those would include the major commercial varieties.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Dr. Harkness, in the course of your professional career have you had occasion to make a study of the marketing of avocados?

[fol. 156] A. No.

Q. Do you consider yourself as an expert in the field of marketing of Florida avocados?

A. No.

Mr. Fourt: No further questions.

And Further Deponent Saith Not.

[fol. 158] Harold E. Kendall, a witness called on behalf of the Plaintiffs, being first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Ferguson:

Q. Will you state your name in full?

A. Harold E. Kendall.

Q. Where do you reside?

A. At Goulds, Florida.

Q. What is your business?

A. I am a grower and shipper of avocados.

Q. Where is your office located?

A. Located in Goulds, Florida.

Q. Do you have a packing plant there?

A. We have a packing plant located on the highway between Goulds and Princeton.

Q. Now, you say that—

A. I am referring to the South Florida Growers Association, of which I am president.

Q. Is that a corporation?

A. It is a corporation.

[fol. 159] Q. Of what state?

A. Florida.

Q. When was it organized?

A. I'd have to—

Mr. Fourt: Pardon me. Mr. Ferguson, before he answers that question, we should like to be supplied a copy of the document which he is using to refresh his memory.

Mr. Ferguson: I don't know if he is going to use any documents.

A. (Continuing) South Florida Growers Association was incorporated in April, 1953, April 29, 1953.

By Mr. Ferguson:

Q. Did it succeed some other business organization?

A. Yes, previously I operated under the trade style of Florida Growers Association from July, 1939, until April 30, 1953.

Q. Was that a corporation?

A. No.

Q. An individual business?

A. An individual business, Florida Growers Association.

Q. And of what does the business consist, that is, what are the operations of the business?

A. South Florida Growers Association consists of a packing house and surrounding property that has facilities for receiving, grading, and packing and cooling and shipping of avocados.

Q. Do you also handle other fruit?

[fol. 160] A. Yes, we handle limes and mangos.

Q. Does your company also engage in the cultivation of avocados?

A. South Florida Growers do that, engage in the cultivation. Independently I own some groves myself.

Q. What groves do you own and to what extent and where are they located?

A. All of the groves I own are in the area of Dade County, known as Redlands area, which is 20 miles south of Miami and these groves amount to 100—115 acres of producing avocados and about 30 or 40 of producing limes.

Q. Do you operate groves for others?

A. Yes, in connection with other activities in the area, we operate a number of other groves on a lease arrangement basis custom management and maintenance work for a number of other growers in the area, in the immediate area.

Q. What does that mean?

A. That means we do the management and maintenance of the groves. We do the maintenance work on them, the maintenance work in this case would be the operations, such as fertilizing, spraying, mowing and harvesting.

Q. How long have you engaged in the growing and handling of avocados in Florida?

Mr. Norris: I was wondering if Mr. Kendall was an individual or an official of the corporation.

[fol. 161] Mr. Ferguson: At this time I asked the witness about his own experience.

Mr. Norris: Some of the questions aren't clear to me with reference to his individual capacity.

Mr. Ferguson: You can't make it clear now. You can do it later on cross-examination.

By Mr. Ferguson:

Q. Have you the present question?

A. As an individual I am interested in the growing and marketing of avocados and have been since July, 1939.

Q. Did you have any prior experience in the avocado industry?

A. Prior to that time I was with Calavo Growers of California for approximately 10 years, from December, 1929, until I came down here in July, 1939.

Q. In what capacity or employment?

A. Well, all the way from cooler clerk up to district manager, mostly in the sales department of Calavo Growers of California.

Q. Does Calavo have sales offices in places other than California?

A. Yes, I believe they have some 35 or 38 sales offices outside of California.

Q. Where did you work?

A. Well, I started out in Los Angeles, went to San Francisco, then to New York, then at the time, I paraphrase these remarks by saying at the time, I was with Calavo they were opening up sales offices around the country and [fol. 162] I was in the process of starting sales offices and I went to New York and Boston, Cleveland, Chicago, Philadelphia, Atlanta, in various capacities and in most cases in the opening of offices and turning them over to other personnel after the offices had been started.

Q. What schooling did you have, Mr. Kendall?

A. I went to the University of California, graduated in 1929.

Q. Did you receive a degree at that time?

A. Yes, a bachelor of science degree in agriculture. I went to Harvard Business School and graduated from there —Harvard School of Business in 1935. I had a leave of absence from Calavo in order to enter the Harvard Business School.

Q. Did you receive some degree there?

A. A Master of business administration.

Q. In your activity in the business, have you written articles on the subject, on the producing and marketing of Florida avocados?

A. There have been a few articles written, I think, one or two in California which were of an informative nature and there might have been one in the Florida Horticultural Society along the same vein.

Q. Will you state generally what has been the development of the avocado industry in Florida during these years in which you have been active in this industry?

A. Well, the avocado industry in Florida was a relatively [fol. 163] small industry during the years of 1925 to '38 and at that time the acreage was static. I believe it was around 2,000 acres, possibly a little less. Beginning with '39 or '40 or '41, along in there, acreage was planted and began to be very heavily planted along around about 1944 to 1950 and I believe the total acreage planted in Florida finally rose to around 11,000 acres. I have heard somewhere around approximately 11,000 acres of avocados planted in Florida.

These increased plantings are just now beginning to come in production. It takes eight to ten years for avocado trees to become, to approach maturity or at least any size and when we found that we were getting increasing supplies of avocados of different varieties, a number of factors in the industry decided they should set up a standard for maturity.

One of the ways of setting up a standard of maturity was to make a study and so forth and so that is when they set up the Avocado Administrative Committee and the Avocado Administrative Committee came into being about four or five years ago. One of the main purposes was to study maturity and attempt to set up standards of maturity. At the present time I believe the production of avocado in Florida is approaching around 600,000 bushels as compared to about 100,000 bushels about 10 years ago, depending on the weather and climatic conditions. Maybe we could increase it to from 800,000 to 1,000,000 bushels in the next three or four years.

[fol. 164] Q. In these recent years what varieties of avocado have become most important commercially?

A. In the last 10 years the Hybrid variety of avocado which have been developed over the past 20 or 25 years, have been planted rather extensively.

The Hybrid, which from a growing standpoint, seems to be well suited to Florida and principally the Hybrid especially the West Indian and Guatemalan varieties. These varieties are principally Booth 8, Booth 7 and Lula varieties.

Q. I direct your attention to the copy of the document identified as Plaintiffs' Exhibit 9 and particularly the first 11 varieties appearing on the list of varieties of avocados contained on this document. Now, what classifications are these 11 varieties, if you can state?

A. I believe most of those first 11 varieties would be classified as West Indian, avocados of the West Indian type.

Q. Were some of these 11 varieties grown in Florida in substantial volume? To make that more definite, let's say 10,000 bushels in one or both of the past two seasons?

A. Oh, yes. The Fuchs was one that was grown, the Waldin, Pollock and Simmonds amounted to—

Q. I notice you place the Pollock and Simmonds together.

A. Well, the Simmonds and the Pollock are classified together because the Simmonds is the seedling of the Pollock. Of course, then we have the Waldin which is one of [fol. 165] the major varieties which has been planted in some quantity during the past 10 years so it is quite a large variety. I believe the other ones would fall in the classification of what we would call minor varieties.

Q. What about the Trapp?

A. The Trapp is a variety which was extensively planted many, many years ago, but hasn't been planted—I doubt if there has been any planted during the last year, but it is a very heavy producer some years.

Q. Did you ship to California say any of the first 11 varieties named in Plaintiffs' Exhibit 9?

A. I don't know, I believe I haven't shipped any of these first 11 varieties to California—no, I can't say that I have.

Q. Number 12 in the list is Booth 8, is it not?

A. Yes.

Q. Have you shipped Booth 8 to California?

A. No, I haven't been able to get any of the Booth 8 to run a high enough test to warrant taking a chance shipping them to California.

Q. What kind of a test?

A. Before we make any shipments to California—

Q. Just answer the question.

A. Oil content test.

Q. Oil content test?

A. Yes.

Q. You were, of course, familiar from your experience [fol. 166] with the predominant varieties of avocado grown in California?

Mr. Fourt: I will object to the question as being leading and suggestive.

Mr. Ferguson: I don't think it is leading or suggestive.

Mr. Fourt: You go ahead and answer.

A. Do I know of the major ones grown in California, yes.

By Mr. Ferguson:

Q. Well, you are familiar with the varieties?

A. Yes.

Q. Familiar with the varieties that—

Mr. Fourt: I object to the question as being leading and suggestive and ask it be stricken on that ground.

By Mr. Ferguson:

Q. What is the size and appearance of the Booth 8?

A. The Booth 8 is one of our varieties that is characterized as heavy among a large number of fruits of a smaller size. I would say that our Booth 8 runs from, on the average, from 10 to 16 ounces in size; very heavy from 12 to 14 ounces at the height of the shipping season. And this fruit is of an oval shape which is somewhat or much like the Choquette in general size and appearance.

Q. Can you tell us whether or not the production of Booth 8s has been increasing or decreasing in recent years?

A. The production of Booth 8s has been increasing over the past 10 years. I think it will continue to increase be- [fol. 167] cause as the groves come into production the Booth 8s are a heavy producer and the newer groves have been planted heavily.

Q. What variety or varieties have you made most of the shipments of avocado to California?

A. Principally the Lula variety.

Q. Looking over the list in Plaintiffs' Exhibit 9, do you recall a shipment of any of the other varieties named in that list?

A. We tried Booth 7 variety and I think we tried some Hickson. I think the Hickson went through without too much difficulty, but the Booth 7, I believe, we had trouble with. They didn't meet the oil content required when they reached California.

Q. You have named the Lula and the Hickson and Booth 7.

A. Yes, those are the—

Q. Have you from time to time procured tests of oil content of avocado from the Subtropical Experiment Station of the University of Florida in Homestead?

A. Yes, we have.

Q. Would you look at the copy of Plaintiffs' Exhibit 13, for identification, and tell us to the best of your recollec-

tion if you applied for the tests set forth in that exhibit?

A. Yes, I believe we did.

Q. To the best of your recollection were the results of these tests reported to you personally?

A. Yes.

Q. For what purpose did you procure these oil tests?

[fol. 168] A. We were trying to find out whether any of our avocados would test 8% oil content with the thought that we then would be able to ship them to the California markets for sale within the State of California.

Q. In any instance, Mr. Kendall, did you procure an oil test for any other purpose?

A. No, I don't think so, no.

Q. If you will look at Plaintiffs' Exhibit 13, for identification, does it indicate that you obtained oil tests in October and November, 1954, on Hickson, Lula, Camp, Vaca, Booth 7, Booth 8, Taylor, and Booth 3 avocados?

A. Yes.

Q. Did you ship avocados of any of these varieties to California in 1954-55 season?

A. We shipped the Lula and Booth 7. That was the year we tried the Booth 7 out there, but it was principally Lula.

Q. Do you recall about when, what time of the year?

A. To California?

Q. Yes.

A. I can't—if I can refresh my memory from some notes—

Mr. Fourt: Mr. Ferguson, may I see the notes prior to the witness answering on this occasion?

Mr. Ferguson: He will have to pick them out.

Mr. Fourt: Yes, he can look at the documents but we would like to see them and then he can answer the question.

[fol. 169] Mr. Ferguson: We will do it that way.

By Mr. Ferguson:

Q. Is that (indicating) the document you are going to look at?

A. Yes, to refresh my memory.

Q. Any other pages you are going to look at?
A. No.

(Defendants' attorney examining paper.)

Mr. Fourt: Mr. Ferguson, we would like to mark this for identification, or do you desire to?

Mr. Ferguson: You are a little out of order. It won't run away.

By Mr. Ferguson:

Q. Is your memory now refreshed, Mr. Kendall?
A. It appears we started shipment to California in 1954 on October 29, 1954.
Q. And when, over what period of time?
A. Through November 19, 1954.
Q. Would it be the end of October?
A. About a three-week period.
Q. Had you been marketing these varieties, I believe you named the Lulas and Booth 7, previous in the season in other states?
A. Oh, yes. We had been marketing them right along under our schedule shipping date.
Q. Had you disposed of part of your supply of these varieties—

[fol. 170] Mr. Fourt: I will object to the question as being leading and suggestive.

A. We had shipped a considerable quantity of these varieties prior to the time we made our first shipment to California.

By Mr. Ferguson:

Q. Now, going to the year 1955, and again looking at Plaintiffs' Exhibit 13 for identification, what varieties, if any, did you procure oil tests on in that season?
A. '55, I think we procured oil tests of the Camp variety.
Q. Let's see it.

(Examining document.)

Q. Here is the page (indicating).
A. That is the Camp variety only and I meant the Booth 3 and Lula varieties. We got them at the Camp Grove.

Q. "Camp" is the name of a grove?

A. "Camp" is the name of a grove.

Q. When did you procure those tests?

A. Those tests were started on November 19 and carried—November 14 and carried over a period of 9 days through November 23.

Q. Did you make a shipment of avocados of these varieties to California in 1955?

A. We made a shipment of Lulas—a shipment of Lulas in 1955.

Q. When?

A. Beginning November 15.

[fol. 171] Q. At what stage was this in your marketing of Lula avocados in the 1955-56 season?

A. Well, we started moving Lulas of 18 ounce minimum back in October—October 3, and then on October 17 we were moving, marketing, Lulas of 16 ounce minimum weight, and on October 31 we started marketing Lulas of 14 ounces and on November 14 we were able to market Lulas of 11 ounce minimum.

Q. Can you state to what extent you had marketed Lulas prior to November 15, 1955?

A. I know we had moved quite a few of them. I couldn't say what percentage we had moved prior to that time.

Q. In 1956-57 season, did you procure some oil tests?

A. We started with the oil tests or asking the experimental station on November 9. I think, however, it might be fair to state that many times we didn't ask for the oil tests on our own account, because we would possibly ask Dr. Harkness' office who would be doing the oil tests and ask them how the tests were coming until they got up above the 8% on any variety. We didn't continuously take samples ourselves. We only took them when we thought there was a possibility, a chance, of getting a particular variety or particular grove that would test 8%; then, at that time, we could start taking tests. In other words, these tests here would be made, or taken, of a grove if for some reason or another we thought they might possibly test 8%.

Q. Those started, you say, November 7?

[fol. 172] A. November 9, according to this table here (indicating).

Q. Was there a number of these tests made on various dates in November?

A. There were a number of tests made from November 9 through the 28th primarily of Lula.

Q. Any later ones?

A. Yes, the Lula even went clear through December.

Q. That was the Lula and other varieties?

A. The other varieties, Booth 1s, Booth 3, Taylor, Booth 4—clear way in December and still weren't passing, still weren't going 8%, let's say.

Q. Any others?

A. Hickson—did I mention Taylor, Booth 7b, Collinson and Herman. All of those varieties, especially in these earlier years, we tried to find out when, if ever, they would test 8%.

We would take samples many times out to the experimental station to ask them to run it.

Q. Did you make shipments to California in this season of any of these varieties of avocados you have just mentioned?

A. No, we only shipped the Lula variety, because—that is all we shipped, I believe.

Q. Can you tell us when?

A. If I can refer to that (indicating) piece of paper I had here a minute ago. That had the same shipping information which indicated what we shipped to California, [fol. 173] avocados to California, November 15, 1955 and—

Q. Now, we are in '56-57?

A. '56-57, I am sorry. If I can refresh—

Q. Is there something that you can refresh your recollection with there? If so, you may look at it after Mr. Fourt looks at it. I mean, before you answer.

A. Let me look and see if I can find anything to indicate '56-57.

Q. Is that the paper you are going to look at?

A. Yes.

Mr. Ferguson: All right. I will hand it to Mr. Fourt so he may examine it.

(Examining paper.)

By Mr. Ferguson:

Q. Have you in mind the question?

A. Could I have it repeated, if you would, please?

(Thereupon, the preceding question was read.)

A. (Continuing) We started making shipments to California on November 16, 1956, and we shipped that year up through January 17, 1957.

Q. Taking the earliest date, November 16, how long was that after the commencement of your marketing of Lulas in 1956-57 season?

A. Well, 1956-57, we started marketing Lulas of 18 ounces or more on October 8. On October 22 we started marketing [fol. 174] Lulas 16 ounces or more and on November 5 Lulas of 14 ounces minimum were marketed. On December 3 Lulas of 11 ounces minimum.

Q. What is the size or weight of the Lulas that you usually market?

A. On these shipments that we usually make at that time of the year the fruit will average a package, that we package, 12 to the flat, 14, 16 and 18 and the 12 will run approximately 20 to 22 ounces; 16 will run around 14 to 16 ounces; 18 will run about 13 to 14 ounces.

Q. You ship the 14's?

A. 14 would run about 16 to 18 ounces, yes.

Q. Going to the 1957-58 season, did you obtain oil tests in that season?

A. Yes, our first test on the Lula was obtained October 31, 1957, and they continued on through the middle part of November, primarily on the Lula, mostly Lulas.

Q. Did you also obtain tests on the other varieties?

A. We obtained one test of Booth 7, one test of Booth 3 and we made—we had one test made that (indicating) shows three here, but it was one sample of Booth 8 on November 18. That was one sample which we presented them. It shows here (indicating) as three tests, however.

Q. In that season did you make shipments of avocados to California?

A. Yes, we only shipped the Lula variety.

[fol. 175] Q. Beginning when?

A. Beginning November 7 and we haven't finished the season, of course.

Q. Had you been marketing Lulas in this season prior to November 7?

A. Yes, Lulas were marketed at 18 ounce minimum on October 7; 16 ounce minimum on October 21; 14 ounce minimum on November 4 and 11 ounce minimum on November 18.

Q. Were some of your shipments of avocados to California barred from sale in that state because of alleged insufficient oil content?

Mr. Fourt: I will object to the question as being leading and suggestive.

Mr. Ferguson: I will break up the question.

By Mr. Ferguson:

Q. Were some of your shipments of avocados to California barred from sale in that state?

A. Yes. Over each of the four years we had shipments which were rejected when they were inspected in California.

Q. Have you prepared a summarized statement of these rejected shipments?

A. Yes, I can give you a summary of these statements.

Mr. Ferguson: Will the Reporter please mark these three pages entitled, "Avocado Shipments Barred from Sale in California, South Florida Growers Association, Inc." as Plaintiffs' Exhibit 17 for identification.

[fol. 176] Mr. Ferguson: I will ask you a few more questions on it.

Mr. Fourt: May I read it?

Mr. Ferguson: Okay.

(Examining document.)

By Mr. Ferguson:

Q. Mr. Kendall, have you with you at this hearing the complete file of each of the seven transactions described in Plaintiffs' Exhibit 17, for identification?

A. Yes, I have a folder giving all the information.

Q. Have you the invoices?

A. I have the invoices.

Q. And the bills of lading?

A. Yes, on each one of the individual shipments.

Q. You have the account record of the customer or consignee?

A. Yes.

Q. Do you have the inspection certificate, if any inspections were made by the Inspection Service of the State of Florida?

A. We have the inspection certificate on each one of these.

Q. Did you get more than one copy of the inspection certificate?

A. No, we get what is known as the red copy of the truck inspection certificate which is entitled, "The Red Copy".

Q. You have the copy of the certificate marked here, marked Plaintiffs' Exhibit 3 for identification, is that what you call the yellow?

[fol. 177] A. That is the yellow copy, I don't know who gets that, I guess the truck driver. Each handler gets a copy of that inspection certificate at the time his truck is loaded.

Q. Do you furnish a copy to the truck driver?

A. We don't furnish them; the Inspection Division furnishes them. We are furnished only with our copy.

Q. Do you know whether or not that goes with the truck?

A. It is supposed to go with the truck and be always with the truck's papers all along the line. That is, the yellow copy.

Q. Yes. Are there inspection stations somewhere near the border of the state?

A. Yes, there are inspection stations on the south entrance to California at Yuma, California, somewhere along there.

Q. I am not talking about California. I am talking about Florida.

A. Yes, there is what we call Road Guard Stations at every exit from the State of Florida across the whole peninsula. I would say it is almost impossible for a truck to get

by one of the inspection stations without showing a bill of lading and certificate, as the case would be.

Q. By this certificate you mean the certificate of inspection?

A. Yes.

Q. Do you employ a selling agent in California?

A. My principal sales agent is Calavo in California. They [fol. 178] handle all my sales out there.

Q. Do you employ Calavo Growers in California in any other markets?

Mr. Fourt: I object to the question as being leading and suggestive.

A. Calavo Growers of California are my principal sales agents throughout the country. They are not exclusive, but they are my principal agents.

By Mr. Ferguson:

Q. Mr. Kendall, is the document now marked Plaintiffs' Exhibit 17, for identification, a true and correct summary of what appears in the books and records of your company regarding these seven shipments of avocados to California?

A. They are as exhibited, yes.

Mr. Ferguson: This document marked Plaintiffs' Exhibit 17, for identification, will be offered in evidence as Plaintiffs' Exhibit 17.

By Mr. Ferguson:

Q. From your experience in the marketing of avocados, can you tell us whether or not a chain store grocery organization would undertake a program of advertising and selling avocados of specified kind and specified price without certainty of receipt of the avocados in accordance with a predetermined delivery schedule?

Mr. Fourt: I will object to the question on the grounds that there has been no proper foundation laid and that the question is assuming facts which are not in evidence. [fol. 179] Mr. Ferguson: Well, I do not think it is assuming anything except that he has experience in the marketing of avocados.

What other assumption is there?

Mr. Fourt: Well, we will have to argue this point before the Court.

Mr. Ferguson: Well, you have made an objection and it is up to you to state what it is. You say that we are assuming facts.

Go ahead.

The Witness: May I have the question repeated?

(Thereupon, the preceding question was read.)

A. (Continuing) No, the chain stores are rather unwieldy organizations. At the time in order to set up the promotion of a particular item they usually require 10 days to two weeks to plan their promotional activities. In making purchases of items like avocados, for example, from Florida to California or to the northern markets, for example, chain stores in Chicago or New York or San Francisco, when they are going to pay for something they want to know they are going to receive it. Because, they have already set in motion and promotional space in the store and advertising and if the situation happens and did happen a number of times in our case, we got a truckload or two or three truckloads of fruit for a chain store and we set a delivery date we intended to put the fruit in the stores, that is within the next day or two, if that truckload is [fol. 180] rejected for one reason or another and it is not available to them, they immediately lose a great deal of interest in that particular item and become quite upset because it disturbs their whole marketing promotion at that particular time.

That has happened in a number of cases and it is particularly disturbing, because of the distances over which we operate and the factor, season, for marketing is relatively short.

Q. I failed to ask you, I am now referring to Plaintiffs' Exhibit 17 for identification, whether or not your file includes a report from your agent or consignee as to the rejections of all or part of the load, as the case may be, and the cause of the rejection?

A. We have what we call an "Arrival Report" which is sent along to the receiving office or consignee and usually

that Arrival Report is filled out in great detail as to arrival and a place for remarks, if anything unusual, such as a rejection of a load or part of a load. All of those notations are made and many of the shipments that notations were made on show certain portions were rejected, because of oil content being below 8%.

Q. Is that the basis in each instance of the statement in this exhibit that certain portions of the loads were rejected upon test of oil content?

A. Yes.

Q. Are all of these avocados handled by your company marketed under Federal Marketing Order No. 69 and Fed-
[fol. 181] eral Marketing Agreement No. 121?

A. Yes, all of our avocados are under that regulation.

Q. How long has this been true?

A. Ever since the inception of the Avocado Administrative Committee, which was in 1954.

Q. When avocados shipped by you to California are rejected in that state, what happens to them?

A. We have to find some other home for them and usually we have to have them re-shipped to Arizona or Texas, if they are in south California or if they are in northern California, they are sent to Salt Lake City or Portland or Seattle, any place we can dispose of them outside of California.

Q. What effect, if any, does this have upon these other markets as far as your sales are concerned?

A. It naturally upsets these other markets to have a load of fruit dumped into them, either in good or in poor condition, at best, and it amounts to an oversupply at worst. It amounts to a great deal of fruit, a great deal of ripe fruit, which has to be sold for most any price which has an unsettling effect upon the market.

Q. What is the time lag for a shipment of avocados from Florida to California?

A. Approximately five days to California.

Q. Then there would be some further time in California?

A. Yes.

[fol. 182] Q. For inspection and handling and reshipping—

Mr. Fourt: I object to the question as being leading and suggestive.

A. Usually about a day is involved in the inspection and/or rejection procedure in the particular California market. Then, of course, there is a delay involved of further trying to arrange for reshipment, which isn't easy to have a part load go to Salt Lake City or Portland. It is not only very expensive, but it is difficult to get the reshipment maintaining proper condition of refrigeration and speed.

Q. Taking into account the trip and all that happens in connection with the reshipment and resale, what would be the whole time period?

A. You mean the whole time involved in a rejected shipment?

Q. The whole time involved in a rejected shipment.

A. Usually I'd say seven or eight or nine days, but the difficulty involved there in many cases is that the fruit after it is rejected is not necessarily under supervised control which would insure its being kept in good condition. We many times take a loss on reshipment, because of it going out of our control and becoming ripened or damaged in some way or other.

Q. When you say "ripe", in what sense do you mean?

A. Soften.

Q. Is an avocado a perishable fruit?

A. Very perishable, if not kept under proper refrigera-
[fol. 183] tion at all times.

Q. Mr. Kendall, have you requested your accountant in your office to compute from the sales records of the company the volume of avocados sold by your company since the commencement of 1954-55 selling season?

A. Yes, I have asked my accountant to work some figures out. I worked with him.

Mr. Ferguson: I will ask the Court Reporter to mark these (indicating) pages as Plaintiffs' Exhibit 18, for identification.

By Mr. Ferguson:

Q. Does the statement now marked Plaintiffs' Exhibit 18, for identification, truly reflect by the books and records of

your company the volume of avocados handled in the four calendar years 1954, 1955, 1956 and 1957, also the distribution of sales under these three headings, "Sales in Florida", "Sales in California", "Sales in other States", the distribution in the years 1956 and 1957 and then a computation of the percentage, is that all true and correct?

A. Yes, those reflect the figures from our records.

Q. And the statement is true and correct?

A. Yes.

Mr. Ferguson: This document will be offered in evidence as Plaintiffs' Exhibit No. 18.

By Mr. Ferguson:

Q. Mr. Kendall, have you a demand for Florida avocados in chain store organizations or commercial merchants in [fol. 184] California, which you could not supply because of the California 8% oil test?

A. Yes, I think every year we have requests for avocados to be shipped to California both by people in California and by shipping brokers from this area here and we have never been able to comply with these requests for shipment.

Q. Tell us about these requests.

A. Especially in the beginning part of the season, it is only during the last part of the season which we are able to make the shipments with any—well, for one thing, Safeway organization for the last four or five years in California have used a great many avocados from not only me but other shippers down here and every year all through the month of October and early November they were trying to get all of the avocados they could from us. We were unable to make shipments then, even though it was at the peak of the shipping season and we were making shipments all over the United States, to Phoenix and Portland, right to the border of California, but we haven't been able to ship into the State of California during the month of October.

Safeway and Lucky Stores, one of the large stores, were interested in our supply of avocados and produce houses on the markets in Los Angeles and in San Francisco have asked for shipments repeatedly. In addition to distributors in Florida making mixed fruits are interested in big Florida

avocados to include in their shipments of citrus going out there. It has been true during the last part of October [fol. 185] and early part of November. That is especially true during the shipping season of Booth 8s, we haven't been able to make a shipment out there of that one variety. We have another big peak and that is the Lula. We have a big supply available in October and early November.

Q. Can you name some of these persons or organizations?

A. I think I forgot to mention—

Q. With whom have you had communication about shipments to California?

A. I think I forgot to mention Calavo Growers, who represent me in the California markets, have also wanted to get shipments of avocados to handle—shipments of Florida avocados to handle in California markets just as early each year as they possibly could get them, indicating a considerable demand for avocados was at those markets at the time and they could use pretty near all they could get.

I think it should be understood we are in business or are operating on a day-to-day basis and a good deal of the communication is by telephone and we don't have a great deal of written requests, because we are in touch with our sales agents nearly all the time, every day, usually, and requests come up frequently in the conversation, "When will the company ship to California", or at least in that particular vein.

I think I might say in particularly mentioning names that Safeway organization, Mr. Jules Merkle, who is the [fol. 186] East-West Field Buyer with offices in Lakeland, Florida, and Mr. Jake Snoddie in Belle Glade. He is the Belle Glade buyer. Mr. Burris, who is their Eastern Produce Supervisor with offices in New Jersey, who used to be in California, came in the office in September of 1957, this season, and requested shipment of avocados to California, just as soon as they possibly could get them, because they had very favorable experiences with the Florida avocados in the last year and wanted additional shipments as soon as they could get them. I believe they indicated they had a number of people—their experiences in their stores were that they had a number of people who preferred the larger Florida avocado, possibly preferred them to the smaller

California avocado, maybe for the mild flavor and low calorie content and lower oil content.

Anyway, he indicated he thought people were eating Florida avocados in the East, West and all over California and they had potential and actual customers for Florida avocados in the markets they serviced.

I might say the particular marketing organizations, such as Lucky Stores in San Francisco, use a large amount of Florida avocados whenever they can get them and certainly Calavo has ordered a large quantity during the season.

Q. Name some of the people in Calavo with whom you have had some communication on this subject?

A. Usually any communication through the year would be with the San Francisco manager, Ed Peters and the Los [fol. 187] Angeles manager Al Jones, in Los Angeles.

I might say, however, that there have been other people in the Calavo organization who expressed interest in handling avocados out there primarily from the sales standpoint because they felt, I think, they felt that other people were handling Florida avocados and there was no reason why they couldn't, since there seemed to be a demand and they wanted them.

Q. Did you get any letters on this subject from any of the Calavo people?

A. This (indicating) is on October 6, 1955, the traffic manager for Calavo in Los Angeles.

Q. What is his name?

A. Paul Helin. He said, "Am sure that Calavo's Western Division staff will do everything possible to get its share of Florida avocado business. We are hoping that your supply situation will permit us to be reasonably competitive."

Evidently, we had been in phone conversation because of this memo I wrote to Paul Helin on October 27, "With reference to our phone conversation I understand that both Lulas and Booth 7s in the last three or four days with warm, dry weather I would believe there should be shipments going to California towards the latter part of next week. Will let you know how the tests come out the first of next week in order to keep you posted."

Mr. Court: May I see those two letters?

The Witness: Yes.

[fol. 188] Mr. Ferguson: Well, finish the answer and then we will let him look at all of them.

By Mr. Ferguson:

Q. You go ahead and finish.

A. I will continue. Last year I have a notation here on a letter dated November 2, 1956, addressed to Mr. Harvey Futch, another shipper of Florida avocados to Calavo and to myself from Mr. Gene Royle, who was a sales expediter at the time and he said, "Any information at all that you can give us will be greatly appreciated, because all of the boys are chafing at the bit to get started on Florida avocados.

"The four or five truckloads for Oakland are all 14 size, so we hope this size will be available in quantities when the 'go-ahead' is given on shipments to California."

He further says, "We now have on order five truckloads for Los Angeles and another four truckloads for Oakland, California. These, of course, are just starters and our orders will be considerably more than this when the deal opens up for the California markets. We will appreciate receiving reports from both of you as to how the maturity is coming along, because we definitely want to be in on the ground floor for Florida avocados in California markets. This is the one thing that the boys are stressing the most, that we have them first so we can be in the deal from the very beginning."

And then this about four or five days later on November 7 Mr. Allen Mishaud, General Sales Manager of Calavo [fol. 189] Growers noted that, "Gene Royle is sitting with a number of orders and nearly all of our boys seem to have a good bit of backlog. If the interest and strength develops, we ought to be able to offer you a darn good market here for some of your fruit."

I haven't been able to look through my records sufficiently to find a great deal more. As I pointed out, a good deal of our conversations are on the telephone. I don't have a great deal of written memos other than just day-to-day indications.

Q. Plaintiffs' Exhibit 17, for identification, as to this classification "Sales in Other States", can you state in a general way what territory that includes?

A. "Sales in Other States" is the 47 other states. It is all of the other 47 states, principally in the Northwest, Portland, Seattle; Middle West, Chicago, Cleveland, Kansas City area, and in Southwest in New Orleans, Dallas, Houston, Antonio; East, Washington, Philadelphia, New York and Boston. Primarily in the areas of large terminal market distribution.

Mr. Ferguson: You may cross-examine.

Cross examination.

By Mr. Fourt:

Q. Mr. Kendall, you mentioned doing business as the Florida Growers Association; is that a sole proprietorship?

A. Yes.

Q. And is it true that you were in business from July 9, 1953?

[fol. 190] A. As the Florida Growers Association, yes.

Q. During those dates, have you had occasion to ship any avocados to California?

A. No. I didn't ship any to California. I believe other shipments were made by competitive shippers, but I believe at the time Calavo Growers wouldn't handle any. My competitors were shipping, but I wasn't able to ship any.

Q. Do you know of the varieties that your competitors were shipping in California during that term or terms?

A. No.

Q. How long have you been president of the South Florida Growers Association?

A. Since April of 1953.

Q. And what percentage of stock do you hold in that corporation?

A. Well, Mrs. Kendall and I have control or own all of the stock in the corporation.

Q. With respect to your groves, that you own in your name, what varieties do you grow there?

A. Primarily Pollock, Fuchs, Waldin, Booth 8, Booth 7s, Lulas, maybe a few other minor varieties, but those are the primary ones, I believe.

Q. Prior to the inauguration of the Florida Marketing Order, is it true that the presence of a hurricane would tend to hurry the picking of avocados?

[fol. 191] A. No, but when a hurricane is around, people tend to want to pick a little more heavily than they ordinarily would. However, I might say the tendency in all of our marketing prior to our Marketing Agreement and prior to these large increases in supply was to hold back our fruit because the prices were higher as we went along through the season, because frequently we didn't have many of the late varieties, enough of what you would call the late varieties. So the tendency was to hold even though a good deal would drop on the ground, it still was the tendency to hold.

Q. Prior to the issuing of the Marketing Order and when the warning of hurricane was marked, didn't a lot of that fruit hit, fruit in an immature condition, the market and have a tendency to spoil it?

A. There was a tendency to pick more of the varieties being picked at the time. You see, most of the hurricanes come in the period of August and September and during that time your Waldin variety is the principal variety and most of the growers would tend to pick their Waldin variety ordinarily, because in the six or seven week period, if a hurricane was coming, there would be a tendency to pick a little more heavily on the Waldin. I don't think there would be too much movement of Lula and Booth 8 prior to the Marketing Agreement program.

Q. That is, late hurricanes might cause them to market immature fruit?

A. I wouldn't say immature fruit, you would move more [fol. 192] Booth 8 and Lula.

Q. Prior to the Marketing Order, would a rise in the market price cause some immature fruit from Florida to be sent to the California market?

A. Well, it might be—I wouldn't say immature, it might be more fruit would go to market when the prices got higher. I think the same thing applies there as to the

hurricanes, the growers would tend to pick heavily after market prices rose on the particular variety they were picking at the time.

Q. Is it true, Mr. Kendall, that the main varieties that everybody either planted or want most are the Booth 7, Booth 8 and Lula varieties?

A. Yes.

Q. It is your estimate that in the future in Florida, say between the next five to ten years, that approximately 75 to 80 per cent of your total marketed production would be in those three varieties?

A. I believe, if you include Waldin in there, it might be. Waldin, Booth 7, Booth 8, and Lulas would be probably about 75%.

Q. Mr. Kendall, I show you Plaintiffs' Exhibit 13, for identification; now, the first page at the top part is a summary of tests made during 1954-55 season. Did you personally deliver any of the shipments to the Homestead, Florida Experiment Station?

A. No.

Mr. Ferguson: You mean samples?

[fol. 193] A. Samples?

By Mr. Fourt:

Q. Did you personally pick any of those samples?

A. I may have, but I couldn't say which ones.

Q. By far, the majority of these samples were not picked by yourself, is that right?

A. Yes.

Q. Page 2 of Plaintiffs' Exhibit 13 refers to oil tests made during 1955-56 season. Did you personally deliver any of those samples indicated on that page to the Homestead Experiment Station laboratory?

A. No.

Q. Did you personally pick any of those samples?

A. No.

Q. Page 3 of Plaintiffs' Exhibit 13, for identification, purports to cover the oil tests for 1956-57 season. Did you personally deliver any of those samples to the Homestead Experiment Station?

A. No.

Q. Did you personally pick any of the samples?

A. I may have, possibly. I might do well to explain the procedure in which these are gathered.

Q. May I ask you one more question as to the sheet?

A. Yes.

Q. As to this 1956-57 season, would you say that by far [fol. 194] the large majority of the samples were not picked by yourself?

A. Right.

Q. The last page of Plaintiffs' Exhibit 13 purports to cover the 1957-1958 season. Did you personally deliver any of those samples to the Homestead Experiment Station?

A. No.

Q. Did you personally pick any of those samples?

A. I may have.

Q. Would you say it would be true that the majority of these samples were not picked by yourself?

A. Right.

Q. Do you wish to explain the procedure, now?

A. I think it is only fair to state that I have around 200 to 250 people working for me. The man in charge of my field work, the superintendent of my field crew and his assistant are the ones who are in charge of harvesting, making the selection of samples and delivering them to the experimental station and bringing back the results after they are obtained. So there would be no occasion to make a personal test.

Q. Mr. Kendall, judging time from today backward at what period or point of time did you determine to test the California Oil Standard,

Mr. Ferguson: That's objected to. I'll object on the grounds it is not proper cross-examination.

By Mr. Fourt:

Q. You may answer.

[fol. 195] A. I am not sure as to the point of time, but I believe it goes back over the last three or four years when we found—I believe that it would be about certainly, as I said, in the last couple of years anyway.

Q. Taking the date on Plaintiffs' Exhibit 13, for identification, the test appeared in October, 1954, did you consider this problem of the California Oil Test as early as that date?

A. Your question is did I consider the California Oil Test problem as of the date of the test? The oil problem was our concern.

Mr. Fourt: I withdraw the question.

By Mr. Fourt:

Q. Did you consider the filing of a suit, of a lawsuit, to test the California Oil Standard as early as October, 1954?

A. As a matter of fact, I don't know just when we did consider it. It has been considered over the past several years, but I don't know just when. It is pretty difficult to pinpoint the exact time we decided to question the oil content.

Q. In fairness, would it be fair to say several years would be at least January 1 of 1956?

Mr. Ferguson: I am going to object, because you are using a vague word "considered". I don't know what you mean by that and I don't know if the witness knows what it means.

By Mr. Fourt:

Q. You may answer.

A. I'll be frank, I don't know when we did come to the [fol. 196] decision to.

Q. Well, perhaps I can rephrase the question. In November, 1956, did you have a probable lawsuit in mind testing the California Oil Standard when you requested tests be made by the Experiment Station at Homestead?

A. I don't know whether you can say we had a possible lawsuit in mind. We weren't looking for a lawsuit, but over a period of time we Florida growers felt the oil content standard was unfair, but I don't know just when we arrived at the decision to question it.

Q. Your best estimate is several years back from today?

A. Yes.

Q. Directing your attention to Plaintiffs' Exhibit 13, for identification, on the first page, 1954-55 season, is there any particular reason that a test would have been selected on that particular date, October 14, 1954?

A. No, other than what I stated before. We were usually looking over Dr. Harding's shoulder and asking him how the oil content was running—

Mr. Ferguson; You mean Dr. Harkness.

A. (Continuing) Dr. Harkness and asking him how the oil content tests were running and then we would try to figure out what groves, what varieties might possibly come close to the 8% and that is when we started gathering our samples.

Q. What is the value of your—first of all, what is the [fol. 197] location of your packing shed?

A. I object to you calling it a "shed".

Q. I will sustain your objection.

A. It is called the Pink Palace.

Q. Where is it located?

A. U. S. Highway No. 1, between Princeton and Goulds, which is approximately 25 miles south of here.

Q. What should we call that establishment?

A. A packing house.

Q. What is the approximate value of your packing house at current market prices?

Mr. Ferguson: I don't see how that is a proper question.

A. It is about $300,000 worth of building and about $100,000 worth of machinery and equipment, with another forty or fifty thousand dollars worth of improvements. Approximately $500,000.

Q. When was the packing house built?

A. It was completed in August, 1955. I had other packing facilities, however, which were started in January, 1940.

Q. At any time from August of 1955 until today, have you purchased and set up any testing equipment for use in the packing house for the purpose of making the California Oil Test on Florida avocados?

A. Not in my packing house.

Q. What reason, if any, did you not do so?

A. Well, we relied upon the Experiment Station to make [fol. 198] whatever tests were required and we didn't feel the necessity of big testing equipment for our use alone. As a matter of fact, the Experiment Station purchased their equipment at the request of a number of growers and handlers.

I believe I may say we never made a shipment of avocados to California until after we had made tests or had tests made by the Experiment Station of those particular groves we wanted to pick the fruit from for California shipment. We always kept the fruit that went to California separate all the way through the picking and packing operation, pre-cooling and so forth. That was so there would be no chance in our mind to mix a lot of fruit that would go below the 8% after it got out there.

Q. Was any effort made to test fruit other than the fruit which was tested in Homestead as previously described in your previous testimony?

A. No.

Q. To rephrase that, were any tests made of fruit selected at the packing house?

A. No—with this possible exception, if a grower that picked a lot of fruit, sizable quantity of fruit, we might take a sample out of that and run it to the Experimental Station and try to get a test on it right quick to see if it was possibly suitable to ship to California.

Q. Would you say that would be an unusual situation, as far as the usual testing method?

[fol. 199] A. The usual testing method was to check the grove and proceed with the harvesting of the samples and have them tested.

Q. Did you ever select samples from the fruit after it had been packed and loaded on a truck?

A. No.

Q. Directing your attention to Plaintiffs' Exhibit 18, for identification, is it true that 1955-56 California avocado production was limited this year, that is, to California was a short year?

A. I don't recall. I think the statistics, which would answer that question, would be better than me. I am not familiar with it at the moment.

Q. Was the 1956-1957 year a short year as far as California production was concerned?

A. I don't know. I am not familiar with the California production figures at the moment.

Q. Do you have with you the figures for sales in California for 1954 from the South Florida Growers Association?

A. I don't think so, no. I had a record of some shipments—I don't know if that is a complete recap on it. I am not sure.

Q. Would it be possible—

A. I have some figures on the 1954 shipments, that might be all there were, but I am not sure.

Q. Would it be possible to obtain those figures for us?

A. I could obtain them for you—total shipments made to [fol. 200] California in '54-55, the only reason they aren't here is because they couldn't be obtained because of the shortness of time to get the proper figures. We started 1957 and worked back to obtain these figures.

Mr. Fourt: Would it be possible to arrange with you to have the figures provided to us?

Mr. Ferguson: Let's agree they will be added to Plaintiffs' Exhibit 18.

Mr. Fourt: All right. Is it possible to get the appropriate entries in the other states?

The Witness: I am not sure we can get the sales figures in Florida. I am not too sure of the sales in Florida. Sales in other states—we can get the sales in Florida by taking the total less the sales in California. You take the column "Sales to California" in 1955 and take the "Sales to Other States" in Plaintiffs' Exhibit 18 and—

Mr. Ferguson: Well, as soon as possible, but not necessarily while—these are old records and, frankly, I settled for these because of the time element. I asked for them.

Mr. Fourt: Would it be possible that a new Plaintiffs' exhibit number could be assigned to the new paper which would provide a further exhibit rather than an extra entry?

Mr. Ferguson: We can do it in time for the Reporter here to—

Mr. Fourt: Well, after you complete the new document [fol. 201] and assign a new number. We can get a copy

of these other shipments and put it with this other information and not expunge it from the record. There will be some duplication, of course.

Mr. Ferguson: Let's start with this volume figure, there will be some duplication of a similar exhibit, and leave it as it is.

That number will be 19.

Mr. Fourt: That is 19, an exhibit similar to 18, but with the added figures for '54 and '55.

The Notary: Let the record show we are reserving that number for the additional information.

Mr. Ferguson: Can we also agree that it will be covered by the testimony of the witness with respect to Plaintiffs' Exhibit 18 for identification?

Mr. Fourt: So far as foundation for the document?

Mr. Ferguson: Yes, as far as the figures and accuracy.

Mr. Fourt: In fact, there is no testimony regarding 19.

Mr. Ferguson: Only that we agree the same testimony will apply.

Mr. Fourt: Right.

(Thereupon, the deposition was adjourned at 5:00 p.m., to be resumed at 7:00 p.m.)

By Mr. Fourt:

Q. Mr. Kendall, if I might see the yellow sheet and the other computation that you refer to.

[fol. 202] A. Which one is that, now?

Q. The computation and—yes, that (indicating) sheet and the yellow sheet too.

(Examining documents.)

Q. (Continued) Mr. Kendall, I hand you this document, and ask you if that is a complete listing of your shipments to California in 1954 and 1955?

A. To the best of my knowledge, it was.

Mr. Fourt: Mr. Reporter, I should like to have you mark this copy (indicating) and ask you to mark it at the top as it is in pencil 1954-1955 Shipping Season, next in order. That is Defendants' Exhibit "I".

By Mr. Fourt:

Q. Mr. Kendall, is this the document which I referred to just a moment ago, 1954-55 Shipping Season, now marked Defendants' Exhibit "P" for identification?

A. Yes.

Mr. Fourt: Mr. Reporter, I hand you a document headed California Avocado Shipments 1956-1957 season, and ask you to mark this as Defendants' Exhibit "Q".

Mr. Ferguson: What is that?

Mr. Fourt: '56-57.

By Mr. Fourt:

Q. Mr. Kendall, I hand you Defendants' Exhibit "Q" for identification and ask you if this document enumerates all of the shipments from the South Florida Growers Association, Inc., from Florida to California during the period [fol. 203] 1956-1957 season?

A. To the best of my knowledge, it does.

Q. Mr. Kendall, I wonder if you would make available to us your folder which you previously said contained all of the documents listed in Plaintiffs' Exhibit 17 for identification?

A. Here are four shipment records on the four shipments that were made in the season of '54-55 which refer there as having part of each rejected. There is the folder (indicating) covering those four.

Mr. Ferguson: While you are looking at that paper, may I have the last paper identified?

Mr. Fourt: I will give you both of them.

(Examining documents.)

By Mr. Fourt:

Q. Mr. Kendall, I hand to you the documents which purport to cover the shipment on November 10, 1954, which appears in the top paragraph of Plaintiffs' Exhibit 17 for identification and ask you if you can inform us from those documents what the net return from the South Florida Growers Association was from that shipment?

A. No, I don't think—wait a minute, yes, the net return would be the total of the two, $1700.26, and $423.53.

Q. Now, from those papers can you tell us your profit on the shipment?

A. There is no question of profit, the question is raised as to loss.

[fol. 204] Q. From the figures you gave, what expenses or items would you deduct to determine the loss or profit?

A. As I stated, upon arrival at Los Angeles 118 rejected upon test of oil content and reshipped to Phoenix, Arizona. Sales in Los Angeles averaged $4.43 per box, whereas, sales in Phoenix were only $4.17. If you take the difference from 118 boxes and multiply it out, it comes to $30.68 and then added transportation from Los Angeles to Phoenix, $29.17 makes a total of $59.85, which is what we claim as a loss on the shipment.

Q. Mr. Kendall, is it not true that the sum of $59.85 shown in the paragraph 1 of Plaintiffs' Exhibit 17 represents a reduction in profits to the South Florida Growers Association which was caused by rejection of the shipment in California?

Mr. Ferguson: I will object to that as being purely argumentative. The exhibit states the difference in the yield. There is no question about profit. If it is possible here to determine profit, you can go outside of the whole thing and get a cost accountant to analyze the business of the company to determine whether there was any profit in any one particular sale.

By Mr. Fourt:

Q. Did you hear the question or do you want it read back to you?

A. I heard the question, but I couldn't answer that without an accountant to analyze the costs and so forth. As far as we were concerned, it represented a loss.

Q. It is not a loss, is it, Mr. Kendall. It represents a [fol. 205] loss only if California had accepted the shipment, and that would have caused your returns to the Florida organization to have been increased in the amount of $59.85?

A. Yes, we would have got the $59.85 we were supposed to in Los Angeles along with the rest of the shipment.

Q. Right. You have no information as to your actual net profit or loss on this shipment?

A. I haven't any information here and it would take a good deal of accounting.

Q. Which is a complicated procedure because of the scope of your operation?

A. I would say that's a conservative estimate as to the losses. In sending this fruit to the Phoenix market on top of the fruit that is already there, the price of the fruit was reduced as the result of the fruit going up there on top of that that was there, as well as the shipment that was directed to Phoenix. We ship to Phoenix without going to California and when this fruit comes back on the Phoenix market, it depresses the price of all the fruit. I just analyzed what I lost on it, if it were sold in Los Angeles. That's what I referred to when I said it went back to Phoenix.

Q. Directing your attention to the second paragraph on Plaintiffs' Exhibit 17 for identification, involving a shipment on November 11, 1954, is it true that the last figure being $394.20 represents the sum which South Florida [fol. 206] Growers Association did not receive as a result of the California rejection which they would have received, if the shipment had been accepted?

Mr. Ferguson: I will stipulate that that is true of everyone of these. That is what it is intended to show.

By Mr. Fourt:

Q. Is it further true, Mr. Kendall, as of this moment, you are unable to say the actual net profit or loss to the South Florida Growers, Inc., which left Florida approximately November 11, 1954?

Mr. Ferguson: I think it is argumentative.

The Witness: You started to ask about a figure we got that was profit?

By Mr. Fourt:

Q. No, net profit.

A. How can you determine the net profit without going back to the records and find out what it cost to pack them and what it cost to get them out there? As far as we were concerned, we shipped to California on that market and a good deal of the boxes were sold at a certain price. When they were rejected, then we reshipped elsewhere and we lost money—we figure we lost money as the result of that.

Q. To come back to my question, however, because of this tremendous auditing problem, which would be involved in finding the cost on November 11, 1954, you are unable to say or to give us the actual net profit or loss on this shipment?

Mr. Ferguson: Again, I say that this is just argument [fol. 207] and quibbling.

These are losses. They had sales for these and they lost the money.

The Witness: We are not in business for shipping at a loss or shipping and breaking even. If we lost a certain amount of money, we lost it.

By Mr. Fourt:

Q. However, Mr. Kendall, isn't it true you are unable to give the figure of actual net loss or profit on the shipment of November 11, 1954?

Mr. Ferguson: Same objection.

A. I can't answer any differently.

By Mr. Fourt:

Q. Is it true you cannot give that answer because it would require an auditing?

A. Yes, it would require a further audit.

Q. Now,—

A. I might say that in shipping this fruit to California a lot of this was pretty well booked on arrival. I mean, before shipment in some cases, in fact, we very seldom ship without some assurance because we send them out

there on fairly firm sales, that's about the only basis we did ship on. When we run into this difficulty there, we actually figured we took a loss on it.

Q. In order to save time, I believe Plaintiffs' Exhibit 17 for identification shows 7 shipments during the period 1954 through 1957, is that correct?

A. That's right.

[fol. 208] Q. Is it true, Mr. Kendall, that the figures shown as a loss for each of those shipments is the amount by which the gross returns to South Florida Growers Association, Inc., were reduced as a result of the actions of the State of California?

A. Yes.

Q. Mr. Kendall, has the South Florida Growers Association, Inc., ever attempted to recondition that portion of the lot in California which was rejected because of the failure to meet oil test standard, or has the consignee in California?

A. The Calavo sales organization of California in their offices, I believe, have attempted to recondition them.

Q. Have you or any of your consignees, such as Safeway Stores or Lucky Markets attempted to recondition the lot or portion of the lot which was rejected?

A. Well, Calavo handles our sales and organization out there and if there is any difficulty they handle the negotiations with the Inspection Department.

Q. Have you during the years 1954 through 1957 given any instructions to Calavo Growers, Inc. regarding reconditioning the lot or portion of the lot which is rejected by the California Inspection Service?

A. I don't know that I have told them exactly how to handle the actual reconditioning, but when we do have some difficulty with a lot, there are some conferences on the telephone between the various persons in charge, when [fol. 209] it is in Los Angeles or in San Francisco, about the disposition of the lot and whether we should ship it to Phoenix, Portland or Salt Lake City.

Q. I am referring to the reconditioning or reshipping with respect to the specific instructions that are given Calavo Growers as to the physical re-sorting of the fruit which is rejected.

A. No, I haven't told them that. I think in the trade it would be understood, in the trade, anyone representing you should make every effort they could to handle the shipment to the best advantage. If they felt it would be best to reconsign it or re-sort it, it should be done.

Q. Could you list at the present time the 10 leading marketing centers, municipalities or areas of the South Florida Growers Association for the last season '57-58 season?

A. You mean list—

Q. The most important centers.

A. Distribution centers?

Q. Yes.

A. For my particular organization or the industry?

Q. No, for your particular organization.

A. I couldn't give you the exact figure without looking at my records and I don't believe they are in shape where they would reflect it without a great deal of tabulation.

Q. Can you give us the leading 10 centers for the South Florida Growers Association?

A. I don't know whether I can list the exact 10. There is New York, Chicago, Cleveland, New Orleans, Houston, [fol. 210] Dallas, probably Washington.

Q. Washington, D. C.?

A. Yes, and the Northwest, we usually combine Portland and Seattle and certainly the California market should be in there, either Los Angeles or San Francisco or both.

Q. At the present time is your Los Angeles market smaller than any single city you have otherwise named?

A. It would be difficult for me to tell, because I don't have access to the figures at the moment. It varies a good deal according to the marketing pattern of the time of year and so forth. It would be a little difficult for me to give you that.

Q. Is New York your best market?

A. No.

Q. What is your best market out of the State of Florida?

A. Oh, probably Chicago, we take distribution areas. With Calavo it is a little difficult to tell where this fruit is going after they reship it. You understand Calavo is the sales organization for most of my fruit. It is hard to pinpoint exactly, but I would say Chicago is one of the best markets.

There, again, I might say New York quite readily because well, the Calavo organization of New York isn't as good a distribution center for me as it may be for one of my competitors who might say New York is one of the best distribution centers. So my figure may not be typical of the industry.

Q. What is the next leading center, approximately, to [fol. 211] Chicago?

A. I would say probably the St. Louis-Kansas City area.

Q. What is your third choice as the third largest market?

A. I would like to group by the East and put Washington, Philadelphia and New York together. That is the way they load the trucks. Usually they stop at Washington and Philadelphia—we don't know how much is coming off. It isn't hard to stop when you are going right along the line, and that is why I hesitate when I answer that question as to the exact shipment to various points.

Q. Would you say the Los Angeles market during the 1957-58 marketing season to date is smaller than the Chicago area market?

A. That is the '57 to '58 to date?

Q. Yes.

A. I think so, yes.

Q. And is the Los Angeles area market for the same year smaller than the St. Louis-Kansas City market?

A. I think probably. But you must remember that in the St. Louis-Kansas City market we aren't under restriction. We can ship from the first of July right straight through. Remember you are comparing a total of six or seven months shipping, as compared to the Los Angeles market, for maybe a month or six weeks or two months.

We ship into Los Angeles in September or October. I can show you where Los Angeles is one of the larger [fol. 212] markets in the country for the Florida avocado.

Q. For the marketing season 1957 and '58 to date, was the Los Angeles market smaller than the New York market area—let's make that Washington, Philadelphia and New York market area?

A. Yes. There again you have the same reason. You are shipping to those areas through the summer and fall.

Q. If I can lump together the cities, is it not true that the San Francisco marketing area is smaller for the same period of time than either the St. Louis-Kansas City area or the Chicago area or the New York-Philadelphia, Washington area is concerned individually?

A. You mean the same period of time? If you took the same period of time we were shipping to the San Francisco marketing area in a given period like in November, when we are allowed to go in California with fruit at 8%, I think that the San Francisco market would probably be right next to Los Angeles as one of the largest markets in the country. You can't compare the restricted shipments we made to California in any one season in total to the markets such as San Francisco or Los Angeles. They wouldn't come up to the St. Louis and Kansas City area where we ship for a period of six to eight months.

Q. Is that true of the Chicago area?

A. Yes.

Q. Is it true of the Washington, Philadelphia and New York area?

[fol. 213] A. Yes.

Q. Mr. Kendall, isn't it true that there are certain conditions which can affect avocados after they leave your packing plant, which may affect their sales value in the ultimate destination?

A. If they are properly handled, I don't think so.

Q. However, if they were improperly handled so as to cause a certain defect, which you had no control—

A. We have pretty good control over the shipments because we pre-cool all fruit shipped under refrigeration, we check the shipments daily and on arrival the temperature is taken and we eliminate the outside influences pretty thoroughly on all of our shipments. Now, if it was mishandling or if there was delay for any reason, then we might have difficulty.

Q. Isn't it possible that Lucky Markets, for example, in California could put some South Florida Growers Association avocados in storage, thus rendering these avocados in poor condition?

A. I don't think so; if they were received in good condition, I don't think they would keep them so long as to

cause—our experience with Lucky and Safeway, they order shipments to arrive practically on time. Their orders are based upon daily or weekly need. They order ahead of time and schedule the shipments to come in as they need them. They could keep them conceivably—suppose they ordered a few days too much of a supply, that storage period [fol. 214] wouldn't hurt Florida avocados, because they will keep several days or weeks in storage under proper conditions.

Q. Would you say, although it is improbable, it is possible that Lucky Markets might hold them too long in storage before placing them on the retail shelf?

A. I doubt if they would. They don't buy any more than they are going to use between a two or three day business period. Lucky Stores would have no difficulty at all disposing of a truckload through their markets in two or three days.

Q. Isn't it possible your consignee might damage the fruit of South Florida Growers Association through excessive low temperature causing freezing damage?

A. It is possible, but not probable, because their coolers are set up for proper refrigeration for any of the produce they handle. It is just some—I have been in Lucky Stores' warehouse and they have a modern plant. They have a cooler set up to handle the type of produce they handle.

Q. Mr. Kendall, in respect to the operation in Florida, isn't it true the Federal-State Inspection Service maintains inspectors in Florida packing houses?

A. Yes, practically all the time.

Q. Has this inspector ever rejected any of the fruit in the packing house?

A. We don't use the word "rejected" because he just doesn't accept the fruit. He doesn't allow it to be stamped. [fol. 215] He doesn't accept it, unless it meets the specifications of the Avocado Administrative Committee which are currently in effect.

Q. Is it true then that the inspector who is stationed at the South Florida Growers Association packing house has on occasions refused to accept some of the fruit passing through the house?

A. Not that I know of. In other words, our procedure is to bring the avocados in, in field boxes, bulk, and then put them into our polishing-sizing equipment and right at that point the inspector checks for size, or weight, as the case may be. So, before the fruit is packed, he is checking it. Now, he would have no occasion to reject them from that point on, because he has checked them before they are packed and it is right under his supervision. It is right outside his office where the fruit is stamped as it goes right by to the packers.

Q. Has the inspector had occasion to refuse to accept or approve fruit at the stage of the operation where he makes the inspection?

A. Oh, yes, if they are undersized fruit. He stands there and continually checks to see if they are undersized and if they are undersized, they have to be destroyed.

Q. What happens when the inspector discovers fruit at that stage of the process and it is undersized?

A. Any undersized fruit can't be shipped. We have to dump it.

[fol. 216] Q. At what stage does the inspector make the inspection?

A. He makes the inspection at the end.

We have bins where the fruit comes off the sizer and at the end of that sizing belt where they go into the bins is where he is checking them. He checks them there and he checks them in the bins as the packers are packing them. The checking is right there where they drop off the belt in the bin and he is checking the bins right there.

Q. Can you give the approximate percentage of the fruit which does not pass the Avocado Administrative Committee regulations at the point where they make the inspection?

A. That would be very difficult to say, because most of the growers that are picking for us—they have what they call a ring sizer. They have this ring with them and check the size of the fruit when it is picked. If some way or another one gets through, that is caught at the point where it comes out at the end of the sizing belt before it goes into the bin, and it doesn't get packed. However, in a few cases some growers who may not have used a picking ring may come in with some fruit which is maybe 5%, maybe

10% undersize, well, that fruit is all caught right at the point and not packed. It is eliminated. I would say our percentage varies from zero up to 10 or 12 per cent on an average. For good picking it is around 3, 4 or 5 per cent.

Q. Would it be true as to the most ideal shipment that the percentage of rejections would be near zero on occasions [fol. 217] and on other occasions would be 10%.

Mr. Ferguson: He didn't say that.

By Mr. Fourt:

Q. Would you say the fruit coming into the plant that is rejected would be or might be 10%?

A. Nobody wants any fruit eliminated because it doesn't meet the Avocado Administrative Committee regulations. So we all try to pick to the best of our ability under the limitation of those regulations and if we go very high in our percentage of loss as the result of undersized fruit, it is because someone is making a bad mistake. They should note what the Avocado Administrative Committee's regulations are. I believe all of the growers do know what the Avocado Administrative Committee's regulations are. Most of the growers know what the picking schedules are and recognize them. I don't think any grower picks his fruit with the idea of having them rejected at the packing-house, so they are very careful.

Q. Is it true that on occasions there are serious errors of judgment and there might be as high as 10% rejected by the inspector?

A. Yes. In fact, I might say we have had some growers that just pick some fruit and brought them in and when they were checked, maybe the whole thing was unable to be shipped. But that has been in very few cases. We have gone on around on this thing over the last four years, and the growers have learned what their limitations are and they try to follow it, because they know they have to.

[fol. 218] Q. Is there any average figure as to the size of the shipments coming into your packing house; that is, do they come in in lots of 100, 150 or 300 or what is the size in which they come into your packing house?

A. Mr. Fourt, they vary considerably all the way from 100 bushels to a truckload. As a round figure, depending on the size of the truck, anywhere from 150 to 250 boxes at a time. I would say, though, in Florida our average size of shipment is probably closer to 75 to 100 boxes and smaller.

Q. Now, you are referring to the size of the lots entering your packing house?

A. Yes.

Q. Are these lots of 75 to 100 boxes of intermingled avocados passed over the grading line?

A. They are handled as separate lots and a lot ticket follows through where they are graded and sized and packed, but they are not commingled in lots. They are kept separate until they reach the bin at the end of the sizing belt where they are inspected and put in bins. So they are not commingled until they go into the bin.

Q. When you say the bin, you mean they are placed in a bin according to the size of the fruit?

A. Yes.

Q. Is it not true that in these bins there may be avocados [fol. 219] of numerous producers there from the last two or three days?

A. Not over two at one time, because we run lots that are a little larger in size than would be in other producing areas. I can't pinpoint one when I say 75 to 100, I mean a truck might bring in 75 to 100 and they might bring in three trucks or so from the one grove. We run a lot of 200 or 300. So we actually run larger lots than 75 to 100 in a great many cases.

We try to eliminate the mixing of lots in the bins.

Q. During the 1957-58 season to date, can you estimate the number of different groves which would contribute fruit to your packing house?

A. Well, do you mean groves under my management other than my own, you mean individual growers? In other words, I own or handle probably, I guess, about 40 or 50 groves.

Q. Consider each grove as one unit.

A. Well, I guess we actually get fruit in our packing house from say 75 groves, I guess. You see, for example,

I know Mr. Krome has maybe 100 acres. They are all broken down into probably 15 or 20 days.

Q. Do you have any typical size of shipment in terms of number of flats you would make to the Chicago marketing area?

A. Well, a truckload runs 1600 to 1700 flats and as I pointed out earlier, Chicago is one of the main distribution centers for Calavo and many times we ship to Chicago for instructions and the truck may go on to Detroit, on to [fol. 220] Minneapolis or something like that. So we mail 1600 flats to Calavo, Chicago, but maybe they are redistributed to many places.

Q. Does the South Florida Growers Association do any shipping by railroad carload?

A. No.

Q. Is the figure 1600 to 1700 flats per truck typical shipment to the Chicago market?

A. Yes.

Q. In a truckload of 1600 to 1700 flats, can you estimate how many groves contributed to that shipment?

A. No, that would be almost impossible to do.

Q. Would it be likely to be more than five groves?

A. On some days it might run five—on some other days maybe it would run two or three. When we know we are going to load a certain market area and we want a certain size of picked fruit, they are all out of one grove or maybe you would get two growers and pick all the fruit just for that particular size. We may pick for two days in order to get a certain variety to go to a certain market. Maybe one grove—I would say from one to five would be a fair estimate.

Q. Would it be true to say it is extremely unusual to have one grove contribute a truckload of 16 or 17 hundred flats?

A. I wouldn't say extremely, but I would say unusual, because I think conceivably we have had that many, but it is not usual.

[fol. 221] Q. Would it be true then to say at least 95% of your shipments would come from 10 groves or less where the shipment is 1600 or 1700 flats?

A. Yes.

Q. Does the South Florida Growers Association market under several labels?

A. Yes.

Q. Could you describe what the labels elaborate?

A. You mean the grade?

Q. Yes. That is the answer, that it is a grade. Would you explain what your label signifies in terms of grade?

A. At the present time we don't have them registered as certain grade labels. I believe it was just put through at the last meeting, or two, where all of the packing houses will have to register their labels for grade, but at the present time our label does not signify grade.

Q. Is if the practice of the South Florida Growers Association to pack premium packages, which would generally bring premium prices?

A. No.

Q. At the present time, the 1957-58 season, there has been in this season to date the one grade mark for the South Florida Growers Association?

A. Right.

Q. In previous years you shipped under different grades? [fol. 222] A. Yes, three or four years ago we shipped under different grades, but last year, or so, we shipped under one grade.

Q. Mr. Kendall, were you active in the industry in 1953 and 1954 in the sense of working towards the adoption by the industry of the Marketing Order?

A. I think I could be termed a reconstructed individual. The inception of the Marketing Agreement came from the Florida Growers, as a grass root movement and came from the Florida Growers who with the impetus for trying to determine a more orderly procedure for setting maturity on grade and packing standards and, after the growers got the thing rolling, they applied to Washington. Then the packers came along and I have been active and gone along in trying to do what I could in helping the program, because I believe it to be a constructive program.

Q. At the time was there a referendum held in among the producers and handlers by which ballots as to whether they would be in favor of the issuance of a Marketing Order?

A. Yes.

Q. Did the South Florida Growers Association, Inc., vote in favor of the issuance of the Marketing Order?

Mr. Ferguson: That is not a proper question.

A. It is fair to say I voted for it. I believe it is a good program.

By Mr. Fourt:

Q. What was one of the considerations which led the South Florida Growers Association, Inc., in favor of the [fol. 223] issuance of a Marketing Order, the fact that the handlers operating under the Marketing Order would be exempt from the Sherman Antitrust Act?

Mr. Ferguson: I don't know why you are asking these questions. It is part of the law. The law says so. I take it they did it because of all of the reasons stated in the law.

A. As a handler that wasn't given consideration. I haven't heard that thought mentioned. I believe the impetus came from the growers and handlers and we went along because we felt that this was a progressive step in the marketing of Florida avocados.

Mr. Fourt: I have no further questions.

By Mr. Norris:

Q. Do I understand correctly, Mr. Kendall, that prior to 1954-55 season neither the South Florida Growers Association or the Florida Growers Association, which was its predecessor in business, sold any avocados on the California market?

A. Right. I might add that it wasn't because I didn't want to sell them, it was because Calavo Growers of California have acted as my distributors on an exclusive basis at that time and distributed in the 47 other states and my competitors began to sell in the California market before the 54 season, so that put me at a competitive disadvantage. When the question was brought up, the sales department consulted with other parties and the Calavo Growers came to the realization that if other people were going to sell

avocados in California, they were going to sell Florida [fol. 224] avocados in California.

They as a sales organization represented Florida organizations. I am one of three, and they decided they should be able to handle Florida avocados without prejudice of California avocados. But that wasn't done immediately, it was done after a great deal of consultation.

Q. Do you now market avocados in California exclusively through Calavo?

A. I think all of my sales to date have been made through Calavo in California. I hesitate, because there are other brokers in the state which make up mixed loads. They might have bought some of my fruit and shipped it to California, but I have no real knowledge of it.

Q. You have had no direct sales to Safeway or Lucky Stores?

A. Only through Calavo for the California market. I believe I am safe in saying that, I'm not sure, but I believe I am safe in saying that.

Q. Was that part of your agreement with Calavo prior to 1954 that you would market avocados only through the Calavo organization?

A. I'm not sure at what time we had the exclusive arrangement with them.

Q. My question was: Did you have an agreement with Calavo or were you voluntarily using Calavo exclusively?

A. It was by agreement with Calavo.

[fol. 225] Q. Do you mean by that, if you had sold direct to a chain store in California during this period Calavo would have ceased to operate as your bargaining agent?

A. They threatened to do that.

Q. This is the reason you did not ship any avocados to California before 1954?

A. Right. I won't say this was on the basis of an exclusive arrangement in the California market only, it was through the rest of the United States also.

Q. Mr. Kendall, I refer you to Plaintiffs' Exhibit 18, Summary of Avocados Handled in the Calendar Years '54-55, '56-57, will you note that Exhibit 18 reflects that in 1956 season 15,055 bushels were sold in California. Would you consider that a normal or abnormal volume of sales in California by your organization?

A. I would say that if we were on restricted—

Q. That is not my question.

Mr. Ferguson: You asked him if it was normal.

Mr. Norris: His answer is in the form of hypothetical terms. He is talking about what he would have done, if we didn't have the present law in effect.

Mr. Ferguson: Your question is argumentative. You are asking him, if it is normal or abnormal.

Mr. Norris: That's correct, that's what I want to know.

Mr. Ferguson: You have no standard to know what is normal and what is subnormal.

[fol. 226] By Mr. Norris:

Q. The marketing condition under the existing law, would you consider that normal or abnormal?

A. Well, under the existing law whereby we are not able to ship any variety except the Lula until late in November, if I had full cooperation from the sales agents in California, I would say that was not abnormal.

You see, my figures, I think, are probably not typical necessarily of the industry in that respect, because there is a good deal of pressure and we recognize it at times, from the California avocado growers who use their own sales organizations in California. When that pressure is on, then they tend to put a little pressure on me possibly. I won't say to discourage me, but there isn't quite the opening in the California market there might be to their competitors who are not so bound.

Q. How do you account for the decrease in the volume between 1956 and 1957?

A. This year, I believe, we were retarded a great deal. Our oil content on the Lulas didn't come up to 8% until late. We weren't able to get rolling on this and get them in the chain stores merchandising our avocados and as a result they didn't get interested in them.

When a large merchandising organization gets interested in promoting a product it takes a certain time to get lined up. When they do get rolling, they roll right along pretty fast and this year because of the prices of California avo-

[fol. 227] cados being lower so much earlier and our fruit was held back somewhat longer, we weren't able to get into the markets as easy as we have other years.

Q. Isn't it true that 1956 was a year of an unusually short crop of California avocados?

A. I am not sure about that. I do know 1957 looks like their heaviest crop.

Q. I asked about 1956.

A. I'm not sure it was unusual. It was lighter than the previous year or lighter than this year, but I don't know that it was unusually light.

Q. Would you say that the short crop in California is one of the principal reasons why your volume was so high in the 1956 season?

A. It might have contributed to a certain extent to that, because there was high prices out there and it was easier for us to get rolling and get the merchandising outlets interested in the fruit. When they found they sold so well, they kept on using them.

Q. Directing your attention to the '54-55 season, Mr. Kendall, did you ship any avocados to California in January of 1955, to the best of your knowledge?

A. I will have to look at that sheet (indicating).

(Examining document.)

Mr. Ferguson: January, 1955?

Mr. Norris: That's correct.

By Mr. Norris:

Q. Referring to Defendants' Exhibit "P"—

[fol. 228] A. I don't believe I shipped in 1955.

Q. Does Defendants' Exhibit "P" contain the ones rejected under the 8% oil content?

A. No, this indicates that some were rejected.

Q. But does it show all of the shipments?

A. I believe so.

Q. Isn't it true the Lula season continues through January, Mr. Kendall?

A. Lula shipping season—it can continue, but we can ship from the first part of October on. We have a longer marketing—

Q. Does it continue through January?

A. If we have the fruit available. We have tried to move our Lula avocados when we can move them to the best advantage.

Q. Do you know whether you were shipping Lula avocados in January of '55?

A. I am sure we carried all along.

Q. Did you then send any to California?

A. No, not according to that (indicating) record.

Q. Do you know why you did not send any Lulas to California in January of '55?

A. I don't recall, no.

Q. How about January of 1956?

A. That is on the same sheet. I don't find any shipments in January, 1956. I don't see any.

Q. Isn't it true that the oil content of the Lula variety fol. 229½ would be higher in January than in November, December, or October?

A. I'm not sure. I couldn't vouch for that. I think there were some Lulas that didn't pass the 8%.

Q. Did you ship any avocados, Lula or otherwise, in January, 1957?

A. January, 1957, yes. We sent four truckloads, according to this record here.

Q. You sent four truckloads. How many flats would that be? Let me restate that. How many bushels would it be since your figures are in flats?

A. Figuring four to one, it would be about 1600 bushels.

Q. In January of 1957.

A. According to that figure there.

Q. In other words, you shipped 1500 bushels of avocados to California in January of '57, and so far in the fall of '57 you shipped only 2,434 bushels to California, is that correct?

A. According to those figures there.

Mr. Ferguson: You took the equivalent of one load?

Mr. Norris: I believe he testified in January of '57 he shipped—

Mr. Ferguson: You figured four truckloads amount to 1500 bushels?

The Witness: Converting on a rough basis around 1600 or 1700 bushels for four truckloads converting on a four to

[fol. 230] one basis. I figured 400 to 450 bushels to a truckload—it is a rough figure.

By Mr. Norris:

Q. Did you have any shipments in January of 1957 rejected under the 8% oil content standard?

A. No, the last rejection there was on November 29, I believe that year.

Q. Mr. Kendall, do you have any explanation why in January of '55 and January of '56 you sent no avocados to California, but in January of '57 you shipped approximately 1500 bushels to California?

A. No. We made shipments to California in January of '56.

Q. How many did you ship to California in January of '56?

A. In January of '56 there were three truckloads indicated here. Two on December 30 and three in January, January 4, January 19 and January 20, and December 30, 1955.

Q. Do you know what the volume was of those shipments?

A. Five truckloads—I would estimate it would amount to 2200 bushels.

Q. In January of '56?

A. Yes.

Q. Which month of the year is this California market most attractive to you as a Florida shipper?

A. It is most attractive whenever we can move fruit out there.

Q. I am asking which month or months of the year are [fol. 231] the most attractive for you to ship in there?

A. October, November and December.

Q. Why are those months more attractive than any other month?

A. Because those are the peak months of the year for Florida avocados and the lightest months of the year for California. It is just natural that our avocados would meet a better reception in the market areas when their customary supplies of avocados are very short.

Q. Mr. Kendall, you are well acquainted with the avocado market generally throughout the country, are you not?

A. Yes, pretty well.

Q. And you keep yourself fairly well informed of the market prices of avocados in various markets throughout the country?

A. Yes.

Q. You keep yourself informed of the prices of avocados in California as well as Florida avocados being sold at the same time?

A. Yes.

Q. Excluding both Florida and California, does the California avocado or the Florida avocado generally bring a higher price per pound on the market throughout the country?

A. Well, I can't really give a fair answer to that, until you raise the question as to what is in the pack being sold.

Q. Explain that answer.

[fol. 232] A. For example, a flat of California avocados might sell for $3 and have say 13 pounds in them. You have 13 and a half pounds for an average of 24 or 25 cents a pound, but that flat has 20 to 24—20 to 26 fruit and has [illegible] many sales in it. That flat, taking that price for example, when it has in it 24 and costs 12½ cents and then retails for 17 cents.

Q. What do you mean by 24?

A. 24 counted fruit to the flat. In the same market a flat of Florida avocados—

Q. Were you just referring to the Florida avocados?

A. No, that was California. In the same market on a flat of Florida avocados, maybe they would sell for $2 and a flat which has 13½ to 14 probably 15 pounds net weight, which would be a lower price per pound, but that flat has only 12 sales in that and the fruit costs 17 to 18 cents and has to retail for a quarter or maybe 27 cents.

I think most everybody that merchandises produce or anything else will agree you make a lot more sales at 17 cents than you can or do at 25 cents, even though the fruit at 25 cents may be double that.

To a certain extent, there is a tendency to reduce the asking price of fruit of a large size. That is true not only of Florida avocados, but California avocados.

I think the records of some of the market places in the last year, for example, will show California avocados of a [fol. 233] certain size were selling at the same price per fruit. In other words, the 20 size California avocado was about the same price per flat, or pound, as the case may be, as the 20 size Florida avocado.

Q. You say this is true this year?

A. This past year.

Q. Do you think it is true of previous years?

A. I think we have already met on equal terms. You understand, we have standardized in Florida on the flat which is the same size flat as they have in California. Now, we standardized but at the same net weight. Our net weight is 13½. We pack at 13½ pounds. We standardized. We standardized 13½ net weight which was very similar to which the California avocado is packed and I think over the last year or two where they met in the market places they have tended to bring somewhat closer per fruit price, keeping in mind that our Florida avocado tend to be a good deal larger in size. In other words, we run anywhere from 14 to 20 ounces where the California avocado tend to average 6 to 12.

Q. You say when they are close the California avocados bring a higher price per pound?

A. I modified that by saying not all California avocados bring a higher price per pound than all Florida avocados. Some varieties have a heavy discount especially if they can't be classed as first grade.

[fol. 234] Q. Have you noticed any difference in prices between the comparable Florida avocado and comparable California avocado on the California market than throughout the rest of the country?

A. We haven't been given a chance to put the comparable sized fruit on the California market on time. I have a feeling that our Booth 8 avocado, that run the 20 and 24 size to the flat, would bring a very comparable price if we were allowed to market them on the market in the month of October.

Q. That is your opinion. I am asking actual market prices in California; in the example you used before you compared Florida No. 14's and California No. 24's?

A. That's right.

Q. You indicated that in marketing outside of California and Florida, the California avocado that a 24 would bring a higher price normally than a Florida 14. Would that price differential be greater in California than in the rest of the country?

A. No, not necessarily. Actually, I think that one of their difficulties this past year has been the fact that their avocado haven't been running larger in size. In November, for example, their prices tended to come down.

Q. I ask you only as to the relative price differential between the 14 and 24, whether or not it likely would be greater in California than the rest of the country, excluding Florida.

A. It is pretty hard to measure that actually, because California ships very few comparable sized back East where [fol. 235] we could compare them with the 12 or 14 or 16 from Florida.

Q. Assuming that California is shipping the 24, and—this is the example you used previously—

A. Right.

Q. (Continuing) —you were comparing the price of the California 24 with the Florida 14 in the market outside of California and Florida. I want to take that same example and apply it to the California market and have you say whether the price differential is likely to be greater in California or in the rest of the country or less in California than the rest of the country?

A. I don't think the price differential is liable to be any greater there.

Q. I am making reference, Mr. Kendall, to Plaintiffs' Exhibit No. 9 and the first 11 varieties enumerated on that page. Did you testify that they were all West Indian varieties?

A. I believe I did, yes.

Q. Now, is the marketing pattern for those West Indian varieties significantly different than the marketing pattern for the Hybrid than West Indian and Guatemalan Hybrids?

A. To a certain extent, it is.

Q. Did you tend to market more of the West Indian varieties in the home Florida market than throughout the rest of the country?

A. No, I think probably we marketed those varieties—at [fol. 236] the time we marketed those a good many of the varieties—the shipping pattern was an after effect of the Cuban avocado. We marked out certain markets. We didn't go in New York as heavily with the Pollocks and Waldins as we did in the other areas, such as Texas or possibly into the Middle West in a percentage way.

Q. Is there any difference in the ability of these West Indian varieties to withstand longer shipments than the ability of the Hybrid variety?

A. I would say on an average that our summer varieties do not keep as long as the later fall variety, but I have known of Waldin, for example, going over to Germany to the Army and we have had no complaint on them. We checked when they arrived over there.

Q. Did you fly them over?

A. We sent them up to New York by truck and reshipped by transport of some kind to Germany, and then I believe it was Brussels and reshipped around to various Army installations. We were particularly interested because we wanted to follow through on the Waldin variety and see how it had done, having been shipped that distance.

Q. Do you have any experience with the other 10 varieties comparable to that?

A. We didn't try to ship them that distance. We have shipped the Pollock to Texas and as far as the Middle West.

Q. Did you tend to have more difficulty with these shipments of West Indian variety to distant points more than other varieties?

[fol. 237] A. I could say we tend to have more difficulty, because at the time of the year when they are shipped it is hotter and they ripen a little faster.

Q. During shipment?

A. No, if it is kept under refrigeration it will hold up. But in the various market places they tend to ripen faster.

Mr. Fourt: Mr. Ferguson, I wonder if we could interrupt out of order and have this piece of paper marked next in order.

Mr. Reporter, I hand you a piece of lined paper marked at the top "California Avocado Shipments, 1955-56 Season" and ask it be marked Defendants' Exhibit "R".

By Mr. Fourt:

Q. I show you, Mr. Kendall, what has been marked Defendants' Exhibit "R" for identification and ask you to identify this document.

A. This is a lined paper entitled "California Avocado Shipments, 1955-56 Season."

I might mention that these exhibits—these pieces of paper were not prepared with the idea of having them marked as an exhibit. I originally referred to them only to refresh my memory as to the original date of shipment to California. I am not sure that they are in the proper order or that they are exactly complete. In some cases they—these are notes and they were prepared just for note purposes.

Q. Mr. Kendall, in order that there might be no mistake, would you say to the best of your knowledge that Defen- [fol. 238] dants' Exhibits "P", "Q", and "R" represent shipments made by the South Florida Growers Association from Florida to California through the years 1954 through 1957?

A. I believe that these exhibits "P", "Q", and "R", are tabulated shipments which we made to—which South Florida Growers Association, made to California during these four shipping seasons. However, as I have said before, they weren't prepared with the idea of being an exhibit. I prepared them as notes to refresh my recollection as to the original starting dates and that is all.

Mr. Ferguson: This is four seasons or three seasons?

The Witness: That is, I believe, four seasons there.

By Mr. Norris:

Q. Mr. Kendall, does the fiscal year of your corporation —when does it end?

A. We end March 31. I believe that is when the Administrative Committee's fiscal year is. Naturally, you are making the point we don't ship any fruit after March 31.

Q. So all gross receipts of your corporation for the '56 and '57 season would be reflected in the fiscal year accounting ending March 31, 1957?

A. Yes.

Q. Do you know what the gross receipts of your corporation for the fiscal year ending March 31, 1957, were?

A. I haven't the slightest idea.

Mr. Ferguson: I object to any such question.

The witness has already stated that avocados are only [fol. 239] part of his business and the entire question is irrelevant and immaterial.

Mr. Norris: Well, we consider it highly relevant and a material line of inquiry, Mr. Ferguson, and this is the first of a number of questions relating to the financial position of the South Florida Growers Association.

Mr. Ferguson: I don't think the financial condition of this corporation is within the issues of this case.

I don't think the Court would ever request the witness to answer such a question. You can put it up to the Court, but I am going to suggest to the witness he answer no such question.

Mr. Norris: Then we are going to have to put it up to the Court. Perhaps because of the long distance involved—

Mr. Ferguson: It doesn't make any difference.

Mr. Norris: This line of questioning can easily be handled by written interrogatory. We can apply to the Court for an order, if this is going to be the way you insist on—

Mr. Ferguson: In the broad day light if you have any such idea, you can try it. The Court would not let you pry into the business of this corporation which is in no way involved in this case, other than to the extent to which it is involved within the issues here.

Mr. Norris: I am going to want to know the gross receipts of this corporation during the 54-55 season; 55-56 season; 56-57 season. The gross receipts of all shipments [fol. 240] from all sales of avocados in Florida—in California, correct that, (referring to Reporter) during those same years.

We are going to want to know the net worth of the corporation as of March 31, 1957.

We are going to want to know the gross receipts of the South Florida Growers Association from all sales of avocados, not only the gross receipts of the sales in California for the same years.

Now, can we stipulate that these questions were asked and the witness refused to answer on advice of counsel?

Mr. Ferguson: I certainly am mixed up. You started by putting a lot of things in here—something about the whole business of the corporation and then you injected something about avocados. As far as I can get it, what you are asking about his avocados is for dollar figures, instead of volume figures.

I don't know what you are asking now, to tell the truth. You have shifted ground and I certainly feel it is an imposition to ask this witness about the net worth of his corporation or the net results of the entire operation of the corporation and whether your question about the sales of avocados are in any way relevant, I don't know, because of the many confused statements you have made.

Mr. Norris: I will ask each question separately and then he can make it clear he is refusing to answer.

By Mr. Norris:

Q. What was the net worth of your corporation as of the [fol. 241] close of the last fiscal year, March 31, 1957?

Mr. Ferguson: We have already disposed of that one.

Mr. Norris: I am going to ask each one separately so that the record will show it clearly.

Mr. Ferguson: I am advising the witness that it is not a proper question, and that he is not called upon to answer it unless the Court so instructs him.

Mr. Norris: Can we stipulate then that the Commissioner asked the witness the questions again and that he refused to answer under the advice of counsel?

Mr. Ferguson: You can consider that done.

By Mr. Norris:

Q. What was the net worth of your corporation as of December 31, 1957?

Mr. Ferguson: Same objection.

Mr. Norris: The same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation for the fiscal year ending March 31, 1957?

Mr. Ferguson: The same objection for the reasons previously indicated, and for another reason that the business of the corporation is not only that of handling avocados.

Mr. Norris: The same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation [fol. 242] from all activities from April 1, 1957 to December 31, 1957?

Mr. Ferguson: The same objection. That is the same question.

Mr. Norris: It is a different kind of question, Mr. Ferguson.

Mr. Ferguson: I interpose the same objection.

Mr. Norris: With the same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation for all activities for the fiscal year ending March 31, 1956?

Mr. Ferguson: Same objection.

Mr. Norris: Same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation for the fiscal year ending March 31, 1955?

Mr. Ferguson: Same objection.

Mr. Norris: Same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts from the sale of all avocados by the corporation during the period April 1, 1957, to December 31, 1957?

Mr. Ferguson: The same objection. The question is irrelevant and immaterial. You may have the same stipula-
[fol. 243] tion as to the putting of the questions to the witness.

By Mr. Norris:

Q. What were the gross receipts of your corporation from the sale of avocados during the fiscal year ending March 31, 1957?

Mr. Ferguson: Same objection. Same stipulation.

Q. What were the gross receipts from the sale of all avocados by your corporation for the fiscal year ending March 31, 1956?

Mr. Ferguson: Same objection, and same disposition of the question.

Mr. Norris: You mean the same stipulation?

Mr. Ferguson: That is what I meant by that.

Q. What were the gross receipts from the sale of avocados by your corporation for the fiscal year ending March 31, 1955?

Mr. Ferguson: The same objection. You have already asked him that.

Mr. Norris: I haven't asked him that specifically for that specific date.

Mr. Ferguson: Then maybe it was for a different date.

Q. What were the gross receipts from the sale of all avocados in California for the period from April 1, 1957, to December 31, 1957?

Mr. Ferguson: Same objection. It is irrelevant and immaterial.

Q. What were the gross receipts from the sale of avo-
[fol. 244] cados in California by your corporation during the fiscal year ending March 31, 1957?

Mr. Ferguson: What is the difference between the two questions?

Mr. Norris: The period of time is all.

Mr. Ferguson: The same objection, with the same stipulation.

By Mr. Norris:

Q. What were the gross receipts from the sale of avocados in California by your corporation during the fiscal year ending March 31, 1956?

Mr. Ferguson: Same objection.
Mr. Norris: Same stipulation?
Mr. Ferguson: Yes.

Q. What were the gross receipts from the sale of avocados in California by your corporation during the fiscal year ending March 31, 1955?

Mr. Ferguson: Same objection.
Mr. Norris: May we have the same stipulation?
Mr. Ferguson: Yes.
Mr. Norris: No further questions.

Redirect examination.

By Mr. Ferguson:

Q. Were oil tests ever required for any purpose under the marketing agreement governing your handling of avocados?
A. No.
[fol. 245] Q. Were any oil tests ever requested by you in contemplation of a lawsuit to challenge the validity of the California oil content law?
A. No. The only reason that we had the oil tests made was to ascertain the degree of oil content of fruit which we hoped we would be able to ship to California. We were trying to find these groves and these fruits that would run the highest oil content so that we could make shipments out as early as possible.
Q. Was the Florida crop in the 1956-57 season a relatively large crop or a small crop?
A. It was a lighter crop than the previous year and lighter than this year.
Q. Were there some conditions of weather which adversely affected the crop?
A. Yes, we had a freeze on January 15 or 16, 1956, which affected the size of our crop, reducing it by around 25

of the previous year, and probably about the same amount compared with this year, so it was at least 25% less in the volume of crop than the previous year or the succeeding year.

Q. Were there any other weather conditions that affected that crop?

A. Some of our crops had storm damage. For instance, Mr. Krome had 1600 trees uprooted in that particular storm that occurred in March of that year, which reduced the expected volume of the crop.

[fol. 246] Q. Were there any special conditions with respect to pests?

A. I believe it was in the spring of 1956 that the Mediterranean fruit fly was discovered in Florida, and that affected our distribution pattern somewhat, I believe.

Q. When you make a shipment of avocados to California, which is rejected, what can you do, if anything, to recondition the load?

A. Frankly, sir, I don't know just what procedure is followed to recondition the load. We are really perplexed as to what it is that makes an 8% oil content avocado go bad. It is very difficult to even guess as to the external characteristics of avocados, whether it is a Lula or a Booth 8. I don't know what a person in California could do to recondition our shipments.

Q. In such cases, do you have available in California other Florida avocados to substitute for avocados in the rejected loads?

A. No. I consider that at all times we have been very conservative in our shipments of fruit to California, because we haven't wanted too much fruit rolling at any one time, so that it would run into the difficulty of being rejected and then having to get it on to these other markets. When you get three or four trucks of avocados rolling at the same time, there is that possibility and naturally we worry until they arrive and are accepted.

Q. You have had experience in California as well as in Florida. From your experience and general knowledge of marketing conditions, what would you say is the relative [fol. 247] position of the California market in avocados as compared with the rest of the country?

A. The demand for avocados in toto is considerably greater in California than it is in many other parts of the country. I would say that is probably due to the fact that the people out there probably use more salads and use more avocados in general than they do in other parts of the country.

Q. Is there a Mexican influence?

A. Yes. Just as we found in New York City, one of our biggest demands for avocados comes from the push cart area of Harlem. The original demand in California for avocados started with the Mexican influence, and I believe that it has continued.

Q. Under the Federal regulations governing maturity of Florida avocados, is there a percentage of tolerance in the weight or size standards?

A. I believe there is. I am not sure as to the percentage. It may be 5%, but I am not exactly sure what that percentage is. I believe there is a small tolerance.

Recross examination.

By Mr. Fourt:

Q. During the year 1957-1958 marketing season, as it is known in Florida, what months during that period were the most attractive for the marketing of Florida avocados in California?

Mr. Ferguson: You have already asked him that same question, precisely that same question.

A. I think my answer to that question before was that [fol. 248] the months of October and November and December would be the most attractive because that is the peak of our shipping season for Florida avocados.

Mr. Fourt: May it be stipulated by and between plaintiffs of record in this action and the defendants, Jacobsen, Knight and Brown, that if the same questions propounded by Mr. Norris to Mr. Kendall were asked by the defendants just named, that in response to each question Mr. Kendall declined to answer on the advice of counsel, and that the Commissioner then directed the witness to answer the

question, and the witness declined to answer such questions on the advice of counsel?

Mr. Ferguson: It is so stipulated.

Mr. Fourt: Thank you.

And Further Deponent Saith Not.

[fol. 249] Fred Piowaty, a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Your name is Mr. Fred Piowaty?

A. Yes.

Q. Where do you live, Mr. Piowaty?

A. Coral Gables, Florida.

Q. Where is your place of business?

A. Princeton, Florida.

Q. What is your business?

A. Packing, shipping and selling limes, avocados, mangos, tomatoes and potatoes.

Q. Are you an officer of Florida Lime and Avocado Growers, Inc.?

A. Yes, sir.

Q. And what is your office in that corporation?

A. Secretary.

Q. Are you active in the management?

A. I am the sales manager.

Q. When was the corporation organized?

A. 1956.

Q. Did it then succeed a prior business?

A. It succeeded a cooperative.

[fol. 250] Q. Of the same name?

A. Not the same name, but the same nature of business.

Q. How long did it operate?

A. Since 1939.

Q. Were you active in that business at all times since 1939?

A. No, sir; only since 1943.

Q. That was the beginning of your activity in the avocado industry of Florida?

A. Yes.

Q. What did you do prior to that; what was your prior business?

A. I was in the purchasing business, operating out of Chicago. I was in the jobbing end of it and also in the buying end of it on the road, from 1934.

Q. Is the business of Florida Lime and Avocado Growers, Inc., that of growing avocados?

A. Yes.

Q. To what extent?

A. We maintain a complete grove maintenance setup for growers, besides owning some groves, handling the care and maintenance all the way from planting through to harvesting.

Q. Do you operate groves completely for others?

A. We do.

Q. Does the company own any groves?

A. We own two groves at the present time.

[fol. 251] Q. What acreage?

A. 40 acres.

Q. You refer to avocado groves?

A. Yes.

Q. And what does the corporation operate in the way of avocado groves as lessee?

A. About 125 acres.

Q. Did your company make a shipment of avocados to California on November 15, 1957?

A. Yes.

Q. Was this load of avocados inspected by the Federal State Inspection Service of Florida?

A. Yes.

Q. Where was that inspection made?

A. In our packing house.

Q. After that inspection did you receive an inspection certificate?

A. Yes.

Q. I show you an inspection certificate marked Plaintiffs' Exhibit 3 for identification. Did you receive this particular copy?

A. I received a copy of this particular inspection certificate.

Q. Do you know what happened to that copy?

A. This went with the truck to California, I believe.

[fol. 252] Q. And did I bring it back to you from Los Angeles, California?

A. You did, sir.

Q. Mr. Piowaty, have you prepared a summarized statement from the accounting records of your corporation of the volume of avocados sold by your corporation in the 1954-55 and subsequent selling seasons?

A. Yes.

Mr. Ferguson: Mr. Reporter, please mark this page as Plaintiffs' Exhibit 20 for identification.

(Off-the-record discussion.)

Mr. Ferguson: During the off-the-record discussion the witness suggested an amendment to the answer to state that the seasons covered 1955-56 and subsequent seasons.

Q. Do you keep a record of sales by states?

A. Yes, sir.

Q. Is that a ledger record?

A. Yes.

Q. Is that available here at this hearing?

A. Yes.

Q. In what states did your company make sales of avocados in the years since 1954?

A. Practically every state in the Union. I won't say every state in the Union, because I didn't make any in Vermont that I know of. We probably did have some go through there from Boston, but not any sent directly [fol. 253] there from Florida.

Q. Does this statement show truly the volume of sales of avocados by your company in the three seasons here listed, beginning 1955-56, including the present uncompleted season?

A. Yes, to January 10 of this year.

Q. Does it also show distribution of sales in the three classifications "Sales in Florida", "Sales in California", and "Sales in Other States"?

A. It does.

Q. Does this truly reflect the data in the books and records of your company of the sales?

A. Yes, sir.

Mr. Ferguson: This statement will be offered in evidence as Plaintiffs' Exhibit 20.

Q. Are all of the avocados sold by your company grown in South Florida?

A. Yes, sir.

Q. Are they all marketed under the Federal Marketing Agreement No. 121?

A. Yes.

Q. Did your company make shipments of avocados to California in the four seasons, beginning 1954-1955?

A. Yes.

Q. Is there any reason why the 1954-55 sales are not included in this tabulation marked Plaintiffs' Exhibit 20 [fol. 254] for identification?

A. Primarily, because of the fact that the total volume of sales was rather difficult to pick up, and it would take a lot more work. The California sales would not be hard to find, but the total sales for a particular season would be hard to find.

Q. I think part of my question was whether your company made shipments of avocados to California in each of the four seasons.

A. Yes.

Q. Prior to the time of these shipments, did you obtain oil content tests of avocados by the University of Florida Subtropical Experiment Station at Homestead?

A. Prior to shipping to California?

Q. Yes.

A. No, if I understand the question correctly.

Mr. Ferguson: Will the Reporter repeat the question?

(Preceding question read by the Reporter, as above recorded.)

A. Does your question mean prior to our shipping to California?

Q. Yes.

A. Yes, we took tests.

Q. I direct your attention to an exhibit marked Plain-

tiffs' Exhibit 42 for identification and ask you to examine the list of oil tests which appear in that exhibit, and tell us, if you can, whether these oil tests were made on application of your company?

A. They were.

[fol. 255] Q. Why did you procure these oil tests?

A. For the purpose of seeing if the avocados were running high enough so that we could take a chance on shipping them to California.

Q. Did you in any instance procure an oil test of avocados for any other purpose?

A. No.

Q. Were some of your shipments of avocados to California barred from sale in that state?

A. Yes.

Q. Have you prepared a summarized statement from the books and records of your company of the transactions in which avocados shipped to California were barred from sale in that state?

A. Yes, sir.

Mr. Ferguson: Will the Reporter please mark this statement, consisting of two pages, entitled "Florida Lime and Avocado Growers, Inc.—Avocado Shipments Barred from Sale in California", as Plaintiffs' Exhibit No. 21 for identification.

Q. Do you have with you here a complete file of your company on the five transactions listed in Plaintiffs' Exhibit 21 for identification?

A. Yes.

Q. Does that include a document showing the sale of the avocados in each instance?

A. Yes.

[fol. 256] Q. Together with the bill of lading?

A. Yes.

Q. And a statement of account received from the California customer?

A. Yes.

Q. With notification of the rejection of all or part of a load, and a reason for the rejection?

A. Yes.

Q. Does it include in each instance a copy of the certificate of inspection received by you from the Federal-State Inspection Service in Florida?

A. All but the one of December 8. I was unable to get that from Orlando.

Q. Did you find whether or not you had copies of the certificates in your company files?

A. No. I had to secure copies from Orlando.

Q. You secured copies of the certificates of inspection from Orlando?

A. Yes.

Q. Based on the files and books of account of your company, is this statement of transactions, Plaintiffs' Exhibit 21 for identification, true and correct?

A. Yes.

Mr. Ferguson: This statement will be offered in evidence as Plaintiffs' Exhibit 21.

[fol. 257] Q. To whom was the last of these shipments made?

A. To Felix Cohen and Son, Oakland, California, and Williams and Son Produce Company, Los Angeles.

Q. Was it divided between them?

A. It was a divided shipment, yes.

Q. Are these commission houses in California?

A. Yes, sir.

Q. Where is Williams and Son located?

A. In Los Angeles.

Q. And where is Felix Cohen and Son located?

A. Oakland, California.

Q. How many boxes were there in their shipments?

A. 1874.

Q. Can you say what that means?

A. It means 1874 lugs of avocados, running thirteen and a half pounds net minimum.

Q. Generally, Mr. Piowaty, is there a relationship between the size of the truckload and the distance of the shipment?

A. No.

Q. The question is whether there is a difference in the case of shipments to remote points and shipments to close points?

A. To remote points we would necessarily ship full loads, whereas to a close-in point, you don't ship a full load; in other words, you make partial shipments.

Q. Do you know what part of this particular load was [fol. 258] unloaded at Los Angeles?

A. 900 lugs.

Q. What happened to the balance of the load?

A. 974 lugs went to Oakland, California.

Q. Your statement indicates, does it not, what happened to the 900 lugs of avocados that were rejected in Los Angeles?

A. Yes. 361 of them were rejected because of oil.

Q. And this statement shows the disposition of those 361 lugs?

A. Yes.

Mr. Ferguson: Will the Reporter mark this notice of Standardization Violation Report issued by the Los Angeles County Agricultural Commissioner, Standardization Division, as Plaintiffs' Exhibit 22 for identification.

Q. Was this copy of notice, Plaintiffs' Exhibit 22 for identification, procured for you by your consignee in Los Angeles?

A. Yes.

Q. Does it contain a memorandum of the results of the oil test of these avocados?

A. Yes.

Mr. Ferguson: This notice will be offered in evidence as Plaintiffs' Exhibit 22.

Q. Did the 900 boxes unloaded at Los Angeles contain avocados of different sizes?

A. Yes.

[fol. 259] Q. What sizes?

A. 10's, 12's, 14's, 16's and 18's.

Q. I think it has already been explained that that means the number of avocados in a box?

A. Yes.

Q. Does this notice indicate that a separate test of oil content was made as to the 14's, 18's and 16's?

A. Yes, it does.

Q. The 12's are not mentioned in this notice, are they?
A. That is right.
Q. Were the 12's and 14's sold in Los Angeles?
A. Yes, and one box of 10's.
Q. There was one box of 10's?
A. Yes.
Q. And the 16's and 18's were sold where?
A. Phoenix, Arizona.
Q. What about the balance of the load?
A. 974 boxes went to Oakland.
Q. Were they sold in California?
A. Yes.
Q. When you made your shipments of avocados to California in November, 1955, what was your understanding or expectation as to the manner in which the avocados would be tested for oil content, that is to say, as to the technical method as to whether they would be tested individually or by composite sample?
[fol. 260] A. In the 1954-55 year they were all tested as a composite deal.
Q. That was your understanding?
A. That was my understanding as of that time. In 1955-56 they took individual tests.
Q. And you had not anticipated that?
A. No.
Q. Were all of the tests procured by you, at the Experiment Station, tests of a composite sample?
A. That is right.

Mr. Ferguson: You may cross-examine.

Cross examination.

By Mr. Fourt:

Q. Mr. Piowaty, am I pronouncing your name correctly?
A. Well, if it would make it easier for you or if it would make you happier, you can just call me Fred.
Q. When did your corporation build its present packing house in Florida?
A. The packing house was built in 1951. The one before that burned down.

Q. Where is the packing house located?

A. Princeton, Florida.

Q. How long has Florida Lime and Avocado Growers, Inc. been marketing avocados in California?

A. I think since 1954. It may have been in 1953, but I [fol. 261] don't know exactly.

Q. Did your predecessor Cooperative corporation market any avocados in California?

A. That was the predecessor.

Q. When did Florida Lime and Avocado Growers, Inc. become formed or organized?

A. It was originally organized as a cooperative in 1939, and we changed to our present corporation in 1956, therefore, you will have to differentiate as to which Company you are asking about.

Q. Then it would have been the Cooperative which would have marketed avocados in California in 1953 to the time of the organization of the present corporation in 1956?

A. Yes.

Q. I show you Plaintiffs' Exhibit 20 for identification and ask you if you can supply the defendants with a figure as to sales in Florida for the year 1954-55?

A. It would be rather difficult to do that. I don't know whether I can do that or not.

Q. Would it be possible for you to obtain the sales in California by Florida Lime and Avocado Growers, Inc., for 1954-55?

A. Yes.

Q. Would it be possible for you to obtain the sales in other states for that year?

A. Yes, I can get that.

[fol. 262] Mr. Fourt: Mr. Ferguson, would it be possible to stipulate that a new exhibit exactly like Plaintiffs' Exhibit 20 for identification be filed with a new number, and that said exhibit contain these other figures?

Mr. Ferguson: It may be stipulated that an exhibit to be numbered Plaintiffs' Exhibit 23 will be prepared showing total sales for the season 1954-55, and sales in California during that season.

By Mr. Fourt:

Q. Mr. Piowaty, would it be possible to obtain the total volume of sales in California for the season 1953-54?

A. No.

Q. The reason for that is that the records are in such a shape that you can't extract such information?

A. That is right.

Q. Is it true that there are three principal handlers by volume which market Florida avocados in California?

A. I don't know. I only know of two. There probably may be five.

Q. The two of which you are aware are the plaintiffs in this case?

A. That is right.

Q. Mr. Piowaty, may I see the supporting documents for these five transactions listed in Plaintiffs' Exhibit 21 for identification?

[fol. 263] Mr. Ferguson: Mr. Reporter, please note in the record that the witness has handed documents to counsel in response to his request.

By Mr. Fourt:

Q. Do you have a copy of Plaintiffs' Exhibit 21 for identification in front of you?

A. Yes.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, with particular reference to the top paragraph which reads, "November 10, 1955", could you tell us why Salt Lake City was selected as the market for the lot after it was rejected in California?

A. Yes.

Q. Why was Salt Lake City selected?

A. It wasn't too far away from Oakland, California.

Q. I show you one of the supporting documents and ask you if E. O. Mair did not write you concerning this shipment and state that the sizes in the lot were not the right sizes for Salt Lake City?

A. That is right.

Q. Isn't it true then that there were other adjacent

markets which would have been a better destination for this reconsigned lot?

A. No.

Mr. Ferguson: It wasn't consigned, in the first place; it was a direct sale to Safeway Stores in the first instance.

[fol. 264] Q. From Oakland it was reshipped rather than reconsigned to Salt Lake City?

A. That is right.

Q. With respect to the five shipments shown on Plaintiffs' Exhibit 21 for identification, were each of the five shipments consigned to consignees on the West Coast?

A. No, sir.

Q. Were one or more or can you identify any of them that were consigned to consignees on the West Coast?

A. Two of them were; the one on December 8, 1955, and the one on November 18, 1957.

Q. And those two shipments appear on page 2 of Plaintiffs' Exhibit 21 for identification?

A. Yes.

Q. With respect to the item of loss on page 1 of Plaintiffs' Exhibit 21, dated November 10, 1955, the figure being $1,377.05—isn't it a fact that that figure means that it was arrived at by subtracting it from the gross sales which you would have realized had this lot not been rejected in California?

A. No.

Q. Just what does that figure represent?

A. A definite loss.

Q. At this time is it possible for you to state your actual net gain or loss on that shipment, not with respect to potential profit or total receipts, but as to the actual net [fol. 265] gain or loss to Florida Limie and Avocado Growers, Inc. on that shipment?

A. The actual net loss to Florida Lime and Avocado Growers, Inc. on that shipment was $1,377.05.

Q. Do you know the actual cost to Florida Lime and Avocado Growers, Inc. of placing that shipment of 1129 lugs in Safeway Stores, including all costs?

A. Yes.

Q. How much was that cost?

A. $2,088.65.

Q. Isn't it true that the figure you just stated a moment ago would also have been your contract sales price had the sale been effected in California?

A. That is right.

Q. I direct your attention to Plaintiffs' Exhibit 21 for identification, with specific reference to November 12, 1955, the figure there appearing being listed as $2,170.54.

A. That is right.

Q. Was that figure calculated by subtracting your actual receipts on that shipment from the contract sum that you would have received had the lot been accepted in California?

A. Correct.

Q. What were the total costs to Florida Lime and Avocado Growers, Inc. in placing that shipment in Oakland, California?

A. $3,853.55.

Q. Is it true that the latter figure you stated also repre- [fol. 266] sented the sales price which would have been effected had the sale been consummated?

A. That is right.

Q. Directing your attention to the entry of November 14, 1955, on Plaintiffs' Exhibit 21 for identification, being the figure of $2,296.60, which is noted as a loss, isn't that calculated by subtracting your actual receipts from the marketing of this lot from the potential receipts you would have received had the sale been consummated in California?

A. Right.

Q. What was the total cost of Florida Lime and Avocado Growers, Inc. in placing that lot of avocados in Oakland, California?

A. $4,084.80.

Q. Does this latter figure represent the sales price which you would have received had the sale been consummated?

A. That is right.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, page 2 thereof, with particular reference to the shipment dated December 8, 1955—was the item denoted loss with the figures $1,651.82 calculated by sub-

tracting the actual receipts from the sale of that lot from the figure which the corporation would have received had the sale been consummated in California?

A. That sale was a consignment, and that figure of
fol. 267 | $2,200 is based on the market at the time the shipment arrived.

Q. The figure of $2,200 is not the contract price?

A. No.

Q. Is it true that you had no contractual arrangement with a buyer in California which would have guaranteed to you the price of $2,200, had that lot been sold in California?

A. We had assurance of that, but we had no contract.

Q. The assurance was given to you by your consignee in California?

A. By my representative in California with respect to this particular transaction.

Q. Was the price quoted there "$2 per lug" and "$4 per bruce" based upon market quotations appearing in some state or Federal Price Quotation?

A. No.

Q. How did you arrive at these figures?

A. In a telephone conversation with a receiver as to what the market was and what he was selling them for at that particular time.

Q. I direct your attention now to Plaintiffs' Exhibit 12 for identification. Did you personally deliver the samples shown on the first page of Plaintiffs' Exhibit 12 for identification to the Experiment Station at Homestead, Florida?

A. No.

Q. Did you personally pick the samples which are in-
fol. 268 | dicated on page 1 of Plaintiffs' Exhibit 12 under the heading "Size of Sample"?

A. No.

Q. With respect to pages 2, 3 and 4 of Plaintiffs' Exhibit 12 for identification, which refer to the 1956-57 season, the 1955-56 season and the 1954-55 season, did you personally deliver any of the samples tabulated on these pages to the Experiment Station at Homestead?

A. No.

Q. Did you personally deliver any of the samples tabulated on these three pages to the Experiment Station at Homestead?

A. No.

Q. Out of an abundance of precaution, Mr. Piowaty, did you personally deliver any of the samples which are tabulated on any of the four pages comprising Plaintiffs' Exhibit 12 for identification to the Homestead Experiment Station?

A. No.

Q. Did you personally pick any of the samples from trees as shown on the four pages of Plaintiffs' Exhibit 1. for identification?

A. No.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, with particular reference to the shipments dated November 10, 1955, November 12, 1955, and November 14, 1955, had you given any specific instructions [fol. 269] to the consignees of these shipments with respect to reconditioning the lots in the event of their rejection or the rejection of parts of these lots by the State of California?

A. From others I have found out that there is no profitable way to recondition Florida avocados.

Q. And is it true that your answer would be no for that reason?

A. Yes.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, with particular reference to the date of November 10, 1955, will you convert the figure "1129 lugs" into bushels?

A. Could I?

Q. Yes.

A. That would be simply a mathematical calculation.

Q. Then the answer would be that it is just a mathematical calculation?

A. Yes.

Q. Could the same mathematical calculation be applied to the other figures shown on the same exhibit for the number of lugs shipped on the dates of November 12, 1955 and November 14, 1955?

A. Yes.

Q. Directing your attention to page 2 of Plaintiffs' Exhibit 21 for identification, would the same conversion figure apply?

A. Yes, the same conversion figure would apply on the lugs.

fol. 270 Q. Does the conversion figure of 3.6 apply to the 700 lugs shipped on December 8, 1955 and to the 1874 lugs shipped on November 15, 1957?

A. The conversion applies to the lugs, yes.

Q. The conversion figure would translate the lugs to bushels?

A. Yes.

Q. Would the conversion figure for the "200 bruce" boxes shipped on December 8, 1955, as shown on this same exhibit, apply?

A. A "bruce box" is four-fifths of a whole. You would divide it by five and multiply it by four, which would be 160 bushels for the 200 bruce figure.

Q. Directing your attention to Plaintiffs' Exhibit 20 for identification, do you have with you the supporting data from which these tabulations were made?

A. I have with me the supporting data for 1955-56.

Q. May we see that document, please?

(Hands document to counsel.)

Mr. Ferguson: Let the record indicate that the witness has handed a ledger book to counsel.

fol. 271 By Mr. Fourt:

Q. Mr. Piowaty, would you prepare the tabulation showing the date of shipment to California of the amount of lugs shipped or bushels, depending on your appropriate figures shown in your books, the figures of gross sales for the years or shipping seasons 1954-55; '55-56; '56-57; '57-58 to date, or the most recent convenient date depending on the records?

A. To California only?

Q. Shipments destined for California. In Plaintiffs' Ex

hibit 20 it shows January 10, 1958. Would your tabulation include shipments up and including January 10, 1958?

A. Yes.

Mr. Ferguson: Since we are giving you the sales in California for '54-55, there would be nothing added by this Plaintiffs' Exhibit 23, except as to the total sales in '54.

Mr. Fourt: That is correct. If the same figures are available, there should be no extra effort in including them.

Mr. Ferguson: Let's put it this way. We can forget about Plaintiffs' Exhibit 23, it is only one figure.

You have your shipments to California by date, and amounts in each season, and all of the shipments at the bottom of that exhibit, total sales 1954-55 and the figure.

Mr. Fourt: That will be satisfactory.

Mr. Ferguson: Are you just asking for them on these California shipments as to date and amount of shipments? There was something said before about preparing an ex- [fol. 272] hibit to be numbered Plaintiffs' Exhibit 23. I am going to ask you to delete that.

Mr. Norris: Mr. Ferguson, I believe that probably did include some information this would not. That is the total volume of sales in all states for the years '54-55 and '53-54.

The Witness: I didn't get it. The '53-54 I said I couldn't.

Mr. Ferguson: He said he couldn't give you a total in Florida, but he could give you one in California.

The Notary: The proposed exhibit will be marked, when it is presented, Defendants' Exhibit "S" for identification.

(Thereupon, an off-the-record discussion was had.)

Mr. Fourt: It is stipulated between the defendants and plaintiffs that each of the questions posed by Mr. Norris to Mr. Kendall to which Mr. Kendall refused to answer, may be deemed to have been directed to Mr. Piowaty by myself and that in each case Mr. Piowaty declined to answer on advice of counsel, and that the Commissioner in each case directed the witness to answer the questions. He still declined on the advice of counsel.

Mr. Ferguson: I would suggest that you state that the questions were put to Mr. Kendall with reference to one corporation and the questions would be put to Mr. Piowaty

with respect to the Florida Lime and Avocado Growers Association.

Mr. Fourt: Our two stipulations will constitute one stipulation regarding this matter of posing of the questions and refusal to answer.

[fol. 273] Mr. Ferguson: It is so stipulated.

Mr. Fourt: May the stipulation be extended to that question posed by Mr. William Norris to Mr. Piowaty in the same manner as the stipulation refers to the questions posed by myself?

Mr. Ferguson: Yes.

By Mr. Fourt:

Q. Mr. Piowaty, I should like to direct your attention to Plaintiffs' Exhibit 21 for identification and ask you if the five shipments shown on that exhibit, dated from November 10, 1955, to November 15, 1957, constitute all of the shipments from the Florida Lime and Avocado Growers shipped to California which were rejected at their inspection at California between the dates I just mentioned?

A. November 10, 1955, to November 15, 1957, no, they do not.

By Mr. Norris:

Q. I believe you testified that Florida Lime and Avocado Growers first shipped avocados to California in the '53-54 season?

A. I think so. I know in '54-55—I'm not positive about '53-54.

Q. I see. If any shipments were made during the '53-54 season, were they made without your having previously requested the Homestead Experiment Station to run oil tests on the fruit?

A. If I didn't request an oil content test, they weren't shipped to California. That can answer your question.

Mr. Norris: That is all the questions I have.

By Mr. Fourt:

Q. At any time since either the present corporation, the [fol. 274] Florida Lime and Avocado Growers, or the pro-

ceeding cooperative corporation has been shipping and marketing Florida avocados in California, has either of those two organizations maintained oil testing equipment at your packing house?

A. No.

Mr. Fourt: No further questions.

Redirect examination.

By Mr. Ferguson:

Q. Mr. Piowaty, you just stated that Plaintiffs' Exhibit No. 21 does not include all shipments of avocados made by your company to California which were rejected upon oil test. Why does this exhibit fail to include any other rejected shipments?

A. We had quite a few more shipments rejected in California than these show. We went back to try to dig them out accurately and they are too hard to identify. Rather than include an inaccurate statement they weren't included in the record. They are still too hard to identify, so they weren't included.

Q. Was there something in the accounting record which indicated whether or not there were additional rejected shipments?

A. Oh, yes. The losses were around $21,000 not just the seven we have for a total.

Q. Do you think it would total $7500?

A. No, it was far greater than that, but I figured that was enough to establish—

Q. You could not definitely identify the other shipments? [fol. 275] A. That is right.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Mr. Piowaty, is this figure of $21,000 an estimate?

A. No, that figure is not an estimate.

Q. Well, is it true and accurate to dollars and cents?

A. No.

Q. So to that extent—

A. It is an estimate.

Q. Would you state it is approximately accurate?

A. I would say it is approximately accurate.

Q. Would you say the approximate figure was calculated in the same manner as were your shipments you labeled as losses on Plaintiffs' Exhibit 21 for identification?

A. No.

Mr. Fourt: No further questions.

Mr. Ferguson: That's all.

(Thereupon, at 11:30 p. m. the deposition was adjourned until the following day.)

[fol. 2] R. M. Wimbish, a witness on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Fourt:

Q. What is your name, sir?

A. My name is R. M. Wimbish.

Q. And your address?

[fol. 3] A. My post office address and business mailing address is Box 1148, Homestead, Florida.

Q. What is your occupation or profession?

A. My occupation and profession at the present time is that I am supervising inspector of fruits and vegetables of both the Federal and State Agricultural Inspection Service in the Homestead district. The territory embraces South Miami south to Florida City, inclusive.

Q. And the name of your immediate superior, sir?

A. My immediate superior, which probably would not be clear to you, sir, would be my regional supervisor, however, I am directly responsible for all activities to Mr. Frank Phelan, who is located at Box 307, Belle Glade, Florida.

Q. What is the position or occupation of Mr. Phelan?

A. He is the regional supervisor for the Federal-State Inspection Service. Would you like to have the district that he is in charge of?

Q. From what source do you receive your salary?

A. Our salary comes directly from the Department of Agriculture in Tallahassee, Florida.

Q. Would that be the Florida Department of Agriculture?

A. Yes, but it is called the Federal-State Inspection Service. We are paid through the Department of Agriculture of the State of Florida, however.

Q. Do you have a license issued by the United States De-
[fol. 4] partment of Agriculture?

A. I do.

Q. What is the nature of that license?

A. Well, I will offer that as an exhibit (produces card).

Q. Sir, would you describe this license as it pertains to you?

Mr. Ferguson: Do you want him to read it?

The Witness: The license is self-explanatory, sir. It is issued out of Washington by the United States Department of Agriculture, and it is renewed each year.

Mr. Ferguson: Just read it into the record.

Mr. Fourt: I am reading from license number E-6672, a license which expires June 30, 1958, issued by the United States Department of Agriculture, Agricultural Marketing Service, dated July 1, 1957, which provides that R. M. Wimbish is licensed under the regulations issued pursuant to the Agricultural Marketing Act of 1946 to perform the services indicated on the back of this card. On the back of the card appears this language:

"The above licensee is authorized to inspect and certify to the quality and condition of citrus, limes, potatoes, tomatoes and avocados."

It has a further notation: "For supervisory work."

By Mr. Fourt:

Q. During the calendar year of 1957, what were the busiest months with respect to your inspection service of avocados in your district?

[fol. 5] A. The busiest months?

Q. Yes.

A. I would say October, November and December.

Q. With respect to avocados, what are your duties?

A. Well, my duties as supervising inspector is to see that the inspectors working under my supervision carry out their job as inspectors in the particular houses where they are assigned for duty.

It is also my job to interpret any grades or anything involving grades, whether it be under committee regulations or anything else. In the event that the inspector has trouble in a packinghouse in interpreting the grades, it is my job to cooperate with him and see that he carries out his duties as a licensed inspector.

Q. Is there any particular rule or regulation under which your inspectors work or are guided by?

A. I don't quite understand that question.

Q. With respect to avocados, Mr. Wimbish, is there a particular governmental regulation which it is your duty to enforce?

A. It is my duty to enforce grade standards under this Federal Marketing Agreement, and it is the duty of the inspector to see that the applicant complies with these regulations.

Q. I hand you defendants' exhibit "N" for identification, and ask you to examine that document?

[fol. 61] A. This document that I now hold is the Avocado Administrative Committee rules and regulations governing the shipment of avocados and the grading thereof.

Q. I now hand you defendants' exhibit "M" for identification, and ask you to identify that document?

A. I am familiar with this document. This is a recap of the effective rules and regulations issued pursuant to the order regulating the handling of avocados grown in South Florida, issued by the Avocado Administrative Committee.

Q. Do defendants' exhibits "N" and "M" constitute the governmental regulations which you enforce with respect to avocados?

A. I don't quite understand that, sir.

Q. I will rephrase the question.

A. These two documents that you just showed me are the grade regulations and a recap of the effective rules and regulations, and these are what the applicants have to

comply with under the regulations and orders of the Avocado Administrative Committee, and it is the Inspection Service's duty to see that they are complied with.

Q. These two documents, defendants' exhibits "M" and "N" are the regulations which you and your inspectors enforce with respect to avocados?

A. That is right.

Q. During the months of October, November and December, 1957 how many inspectors and assistants to you did you [fol. 7] employ with respect to avocado inspection only?

A. Well, sir, during the avocado season I work myself as an inspector; however, we did have seven men, not including myself, working on avocados in this district.

Q. Does the South Florida Growers Association, Inc. operate an avocado packinghouse in your district?

A. Yes, sir.

Q. Do you know the name of the president or the leading officer or managing officer of that corporation?

A. Yes, I do.

Q. What is his name?

A. Mr. Harold E. Kendall.

Q. Is Mr. Kendall in the room at the present time?

A. Yes, sir.

Q. Where is his packinghouse located?

A. It is located just south of Goulds, Florida, on the west side of Highway No. 1, U. S. No. 1.

Q. Are you acquainted with its approximate scope of operations during the avocado harvesting season?

A. Yes. That is one of the primary things that an inspector should know, that is, to understand the operations in a packinghouse; in other words, that is a necessary requisite.

Q. During what period of time during the year 1957 did the operation of the South Florida Growers Association packinghouse reach its maximum capacity?

[fol. 8] A. That is a question that I couldn't answer. We do not keep a record as to the operation of a packinghouse. We only serve them with an inspector, and of course we certify to all fruit that goes out of there that is shipped intra or interstate. I wouldn't have those records here. The

only way I could actually acquire those records would be through our office in Orlando.

Q. Does the Federal-State Inspection Service maintain inspection service for Florida Lime and Avocado Growers, Inc. at Goulds?

A. Yes, we do.

Q. So far as your inspection service is concerned, sir, when and during what period of time is the maximum inspection service required?

A. It is a continuous inspection. He is there all of the time that they are operating.

Q. Is there an increased demand for inspection service during any particular part of the year?

A. I would say that as the season dwindles down we don't have as many inspections. Are you speaking now of the district as a whole or of this particular packinghouse?

Q. This one.

A. There is no need for increasing the inspectors in that packinghouse at any time. One man can handle the entire situation during the operation.

Q. During the peak of the avocado season, with particular [fol. 9] reference to 1957, could you estimate how many truckloads of avocados are processed and shipped from the Goulds packinghouse by the South Florida Growers Association, Inc.?

A. I wouldn't have the slightest idea. We have no record of where the trucks go or who they go to. We would have no way of knowing whether they were going intrastate or interstate, because they sell a lot locally, and also sell a lot out of the state. Where it ultimately goes we have no information on that, and it is not our desire to have such information, and it is not necessary in the pursuance of our duties.

Q. I direct your attention to defendants' exhibits "M" and "N" for identification, and ask you, sir, if any other written instructions, other than these two documents, are handed to your inspectors for use in the South Florida Growers Association packinghouse at Goulds, Florida?

A. For the inspection of avocados?

Q. Yes.

A. Yes, we sure do have another document. I think I

have one available here, which is absolutely necessary in the performance of our duties with respect to maturity of Florida avocados.

Q. I show you plaintiffs' exhibit 9 for identification, sir, and ask you if you can identify that document?

A. I am quite familiar with it.

Q. Would you identify it or describe it for the record?

A. This document I hold in my hand is the avocado shipping dates issued by the Avocado Administrative Committee, which presumably controls the shipment of avocados as to maturity. The particular avocados listed on this instrument have shipping dates, weight and minimum diameters at specified dates. It is the duty of the inspector to see that the avocados under these particular varieties coincide with the shipping dates, weight, and measurement.

[fol. 10]

Q. And your testimony at this moment is with reference to plaintiffs' exhibit 9 for identification?

A. Yes. This is the maturity schedule put out by the Avocado Administrative Committee.

Q. And your testimony of a moment ago referred to this document which is marked plaintiffs' exhibit 9 for identification?

Mr. Ferguson: He just said so; he said it twice. There is no question about that.

Mr. Fourt: Will you stipulate that his testimony of just a moment ago with reference to shipping date schedule, was with reference to plaintiffs' exhibit 9 which he held in his hand at that time?

Mr. Ferguson: Certainly.

By Mr. Fourt:

Q. I now hand you defendants' exhibits "M" and "N" and plaintiffs' exhibit 9, all for identification, and ask you if these three documents constitute the only written instructions which were given to your inspectors to inspect fruit at the South Florida Growers Association packinghouse

[fol. 11]

at Goulds, Florida during the avocado season of 1957?

Mr. Ferguson: I think it already appears that this is a summary made of all of the maturity regulations that were

issued during the season. It is admitted in the pleadings that there was a series of prior orders and regulations, each fixing dates for shipment of certain fruits. Plaintiffs' exhibit 9 for identification is a summary of all regulations issued in the course of the season. The question here is misleading, because it does not include the fact that the inspectors have partial lists all through the season.

Mr. Fourt: Will the reporter read to the witness my last question?

(Preceding question read by the reporter as above recorded.)

The Witness: That question, sir, I couldn't answer in that form, because these regulations from time to time are subject to change at the direction of the Avocado Administrative Committee. Whenever they do change them, Mr. Biggar, the manager of the Avocado Administrative Committee, immediately furnishes the inspection service with copies of the effective rules and changes. There are times when they change them, and when they change them I am the first man to get the changed regulations, because I have to see that the inspectors get the revised regulations issued by the Avocado Administrative Committee.

By Mr. Fourt:

Q. Are any written instructions given to your graders [fol. 12] station in the South Florida Growers Association packinghouse at Goulds, Florida other than defendants' exhibits "M" and "N" and plaintiffs' exhibit 9, or documents of that same nature, with respect to their duties?

A. Well, in this period of time I will say that there weren't any others necessary; they had all that was necessary for the carrying out of their duties, that is, these three documents. I gave them written instructions from time to time from my office, but most of the time I just held meetings in my office; and we discussed the different phases of the work. I wouldn't give them written instructions, that is, give written instructions to each inspector, but I will put it on the bulletin board, and I called it to their attention that these are the regulations that we are to go by.

which regulations were issued by the Avocado Administrative Committee.

Q. In addition to written instructions, I take it that you also gave them oral instructions?

A. Definitely, yes.

Q. Are you acquainted with the physical layout of the South Florida Growers Association's packinghouse at Goulds, Florida?

A. I would say that I am familiar with the operations, if that would be considered the physical layout.

Q. Could you briefly describe the operation as the fruit enters the plant until the fruit is packed out of the plant into the truck?

[fol. 13] A. It is first dumped on conveyors, which conveyors take it to the graders, and when the graders grade it, it goes onto the automatic sizers, and from the automatic sizers it falls into individual tubs for a specified or particular size, and then the packers pack out of these tubs, taking a specific size out of each tub.

Q. Into what thing or things do the packers pack the avocados?

A. There are various types of containers. Usually it is what is called a wooden flat.

Q. What happens next, if anything?

A. Now are you speaking of the packinghouse operation or are you speaking of the inspection work?

Q. Well, with respect to the packinghouse at Goulds, Florida, what happens, if anything, after the packer places the fruit in containers?

A. When the packers finish packing a container they place it on what we call a conveyor, and that conveyor conveys the fruit around to another designated spot where it is stacked according to size. This still pertains to the operation of the packinghouse.

Q. What happens next with respect to this fruit in the Goulds packinghouse, if anything, after the fruit is stacked?

A. There is a procedure there for them to place it in a cooler or refrigerating room.

[fol. 14] Q. At this same packinghouse what happens next, if anything?

A. It just stays in the cool room until they get ready to ship it out.

Q. What is the procedure, if there is any, with regard to shipping it out?

A. It is certainly necessary for the packinghouse to have the fruit inspected, and that is where it comes to my job.

Q. I am interested, Mr. Wimbish, in how the fruit leaves the packinghouse or leaves the cooler.

A. They truck it from there into trucks, which are standing alongside the docks.

Q. Sir, at the Goulds packinghouse is the grading done automatically, or how is it done?

A. The grading is done by human hands, by the human element. The sizing is done by weight.

By Mr. Ferguson:

Q. Do you mean weighing or by weight?

A. By weighing. They are placed in these little pockets and they move down to a certain weight where they fall into what we call these tubs.

By Mr. Fourt:

Q. What is the earliest point in the operation that you have just described where the inspector usually makes his inspection at the Goulds packinghouse?

A. The inspector can take his sample any place he so desires. The official inspection is made when the container [fol. 15] is packed and it is on the conveyor starting up to where it is stacked on the floor and segregated by size. However, it is a part of the inspection service to sometimes inspect them in the tub as a preliminary part of the official inspection, and if there is any doubt in the inspector's mind he can tell them that this tub here is not going to grade. They will work on one particular tub or on one particular size before it gets to where the inspection run is officially supervised. His official samples are taken out of the packed box before it is lidded.

Q. Is there any inspection made by your inspector at the completion of the grading belt?

A. Not unless the packinghouse foreman requests it. In other words, they do occasionally come over and say, "Look at this stuff and see how it is running; do you think this will grade by size or weight?" The inspector will then run sufficient samples to determine whether or not they will meet the specified weight or grade. If they fail to meet the weight and grade, he will have one start go through the fruit one by one. He will check the size of each fruit as it goes to the boxes, and that eliminates any confusion later on after the inspector has made his official inspection.

Q. At the Goulds packinghouse is there a regular practice for the inspector to grade either at the tubs or at the end of the grading belt?

A. No, that is not the regular practice.

[fol. 16] Q. Is it done occasionally at that packinghouse?

A. It is left to the discretion of the inspector. I don't encourage it as supervisor. Any time that the inspection service can be of assistance along these lines, we will run a sample for them before packing it, which is no more than right insofar as the Federal-State Inspection Service is concerned, however, we don't make a practice of it.

Q. In what form does the inspector record his observations, if he does it at all?

A. You mean how does he record his official samples?

Q. No. I mean the earlier inspections.

A. I don't understand you. We don't have an earlier inspection. The official inspections are taken out of the packed box after the graders have graded them, after it is sized and graded in the boxes. That is his official samples, and he records that on his daily worksheet.

Q. Does the inspector record his tests of avocados on his worksheet when the avocados are at the end of the grading line?

A. He makes them at the end of the grading line, and his samples are recorded in the back of his worksheet, on the back of his worksheet. Each size is a different lot.

Q. What is the form of the official grade certificate?

A. On the final certificate issued after the fruit has been inspected?

Q. Yes.

[fol. 17] A. I do not have one of them in my possession now, but the form of certificate is United States Department of Agriculture, and we write the grades on it, the number of containers and so forth, and whether or not it meets the Secretary's Order and the specifications of the Avocado Administrative Committee, or whatever grade it was run at that time.

Q. At what point in the operation of the packinghouse at Goulds is the inspection certificate made up?

A. It is made up at the end of the day, or whenever they decide to roll a truck. They give the inspector a manifest for a certain size, which has already been inspected, and it will probably be out of the cooler and ready to go on the truck. The packinghouse foreman will show the manifest to the inspector, and the inspector in turn goes out to the truck and gets the license number of the truck and inserts that on the certificate, so as to show where the truck is from, and he puts down the number of containers shown on the manifest furnished him by the foreman of the packinghouse. I might add, sir, that during this course of operation all of these containers are lot stamped with a Federal stamp, which is the identification to show that the individual boxes have been inspected by the Federal-State Inspection Service, and this stamp shows the house number and lot number. Each house has a lot number and an inspection number on the stamp, and these stamps are issued to these people through our agency every Monday morning for each packinghouse.

[fol. 18] Q. In the ordinary case is any inspection made of the avocados in the containers after the containers are loaded on the truck?

A. There would not be any occasion to unless the applicant so requested, because it is the sort of thing that wouldn't occur anyway, because it is the duty of the inspector to see that these boxes have been inspected.

Q. Is the initial point of the official inspection made of samples in the containers prior to the time of them being placed in the cooler or after removal from the cooler?

A. They are made prior to going into the cooler. That is the usual procedure. In other words, it is a finished product when it goes into the cooler, ready for transportation in or out of the state.

Q. During the 1957-58 avocado season to date, was there any turnover of personnel in your inspection force with respect to your inspection of avocados?

A. Now, that statement is not very clear to me. Just what do you mean by "turnover" in inspectors? I don't understand just exactly what you mean by turnover of inspectors.

Q. I will rephrase the question. You previously stated that during 1957-58 avocado season you had seven inspectors, as well as yourself, working on avocado inspections; is that right?

A. Yes.

Q. Did the same seven men stay on the job throughout [fol. 19] the season?

A. Yes. We try to maintain a nucleus of inspectors that we consider qualified in this field of certifying avocados. I might say this, which would help you a little bit, although it goes back of what you are asking me. It is an established precedent by our department to change inspectors in each packinghouse once a week, if that is what you are referring to. The same man doesn't stay in one packinghouse all of the time. We switch them around to different packinghouses. The department has found this very desirable in our work. We will assign an inspector to a certain packinghouse for a week, and then he goes around and makes his tour of duty throughout the numerous packinghouses, and then he will come back to this packinghouse. In other words, we just keep rotating them around.

Q. Mr. Wimbish, during the peak of the avocado season in 1957, approximately how many packinghouses were in operation in your district?

A. Some of our "applicants" actually we don't consider them as packinghouses. However, they are all subject to inspection. We would call them little growers or something like that. Would you like for me to elaborate on the applicants that we have and what I consider major packinghouses for avocados?

Q. First, how many major packinghouses operate in your district at the peak of the season?

A. I would say about seven, but we have other applicants [fol. 20] who get inspections of avocados.

Q. How many other applicants or packinghouses, other than these major packinghouses, do you have which require inspections of avocados?

A. We will put it down as ten. There are seventeen or eighteen applicants. Most of these are small operators. One inspector usually takes care of two or three of those.

Q. Do you maintain an inspector full time during the peak season at each of the seven major packinghouses?

A. No, sir. We only have two houses where the inspector stays on for continuous inspection, that is, two houses in the district.

Q. What are those two houses?

A. Harold E. Kendall, or South Florida Growers Association, and Lucerne.

Q. Are both of those houses included in your category of major packinghouses?

A. Yes.

Q. What arrangement was made with respect to inspection of avocados at the other five major packinghouses?

A. The Florida Lime and Avocado Growers Association and Rowe Groves are two packinghouses which are right together, and one inspector takes care of those two houses. He works back and forth between the two during their operations.

Q. What arrangement was made with respect to the [fol. 21] other three major packinghouses?

A. I used the word "major", and I guess I shouldn't have used that word, because actually that is a little bit on the false side. The meaning of "major" in my opinion is the same as "large". I will say that there are three more. Do you want me to give you the names?

Q. Yes.

A. Parman-Lehman Packinghouse, located at Homestead; Brooks' Groves, and you might put Gloria Groves in with these three. One man takes care of these three.

Q. Where is the Brooks' Groves packinghouse located?

A. On North Krome Avenue, just within the city limits of Homestead, on the west side of the highway.

Q. Where is the Gloria Groves packinghouse located?

A. It is located just four miles northeast of the Seaboard Railroad, in what we call the Redlands District.

Q. What would be the approximate distance between the Parman-Lehman packinghouse and the Brooks' Groves packinghouse?

A. Two miles.

Q. And the distance from the Parman-Lehman packinghouse to the Gloria Groves packinghouse?

A. What was the first question you asked me? Didn't you ask me the distance from Parman-Lehman to Brooks' Groves packinghouse?

Q. Yes.

[fol. 22] A. That is two miles. Now you are asking me the distance from Parman-Lehman packinghouse to Gloria Groves packinghouse?

Q. Yes.

A. That would be about six miles.

Q. And what is the distance from Brooks' Groves packinghouse to the Gloria Groves packinghouse?

A. About four miles.

Q. And what is the arrangement with respect to providing inspection service to the ten small packinghouses in your district?

A. I will have to deliberate on that to some extent. One man sometimes has to take care of three or four or possibly five little sheds. That is where the growers pack their own stuff. That is what I mean when I say small sheds.

Q. With respect to the ten packinghouses which are smaller than the major packinghouses, is your inspection service continuous?

A. No, it is not continuous. It is what we call "spot checking". They notify the inspectors who are working these particular houses and tell them the approximate time that they expect to get through packing, and he tries to arrange his schedule to take care of these outlying packinghouses.

Q. During the peak of the season in 1957 how often were

you able to observe the work of each of your inspectors as they inspected these twenty-four packinghouses in your district?

A. That is a question that would be hard to answer for [fol. 23] the year 1957, because I didn't keep a record of the actual visits that I made to these packinghouses. My visits are made periodically, but on numerous occasions. On occasions I have calls from my inspectors when they feel like they have something that they are not quite sure about. Then I make a trip up to see this particular inspector and try to interpret the grade or tell him what grade a certain avocado is, or whatever the case may be. I will interpret for him the grade of the fruit or the variety of the fruit. I try to get around to see all of them once a week. If my "houses" are not working, I would make more frequent trips.

Q. To summarize your testimony, Mr. Wimbish, can we say that you see each inspector when they call upon you?

A. Yes. They may call me by telephone if they deem it necessary. Most of the times it is a case of necessity because they are not sure of themselves in regard to grade interpretations of various varieties. If it is a situation of that kind, I make it my business to get there as quickly as possible so as not to delay operations in the packinghouse, and that is something that we certainly don't want to do if it is at all possible to avoid it.

Q. During the peak operations in October of 1957, how many calls would you have a day where an inspector requested assistance in determining the variety of an avocado?

A. That is a question that it is almost impossible for me to give a sensible answer to. They might run along for a [fol. 24] week without calling me, and then they might run for twenty-four hours, and then I might get two calls in one afternoon. These loads are coming into the packinghouse and naturally he is there to check them as they run through, and they might run a pear through that he wasn't quite sure about. The "applicant" might say this or that, but if the inspector is not sure as to the variety or anything else, his instructions are to con-

tact me as quickly as possible so I can go out and make the best judgment I can in my opinion as to the variety or whatever else it is. As I stated before, that might happen once or twice a day, and then we might go a week without any complaints. It is periodical, I would say.

Q. During the peak of the avocado season in 1957 would such calls in which the inspector asked for assistance to determine the variety of an avocado, number between five and ten a week?

A. I would say no.

Q. Would it be greater or smaller?

A. It would be less.

Q. Less than five?

A. I would say it would be less than ten by far.

Q. Less than ten but more than five per week?

A. I won't say less than ten and I won't say more than five. You never know when these situations arise. I might be available when a situation comes up and I might not be available. As I stated before, they may run a week or two without any calls, and then we might get two [fol. 25] calls in a day with respect to determining a variety, which requires my identifying the variety.

Q. Does such a call from an inspector occur numerous times during the season?

A. No, sir.

Q. Do you also have calls from inspectors in which they ask for assistance in interpreting the grade of avocados which they are seeking to establish?

A. Not very often, because they are well versed on grades and they know grades. It would be unusual when we had calls for grade interpretations; mostly the calls would have to do with the determination of varieties.

Q. Does the Florida Lime and Avocado Growers Association maintain a packinghouse in your district?

A. Yes, sir.

Q. Are you acquainted with the operation of the packinghouse?

A. Yes, I am acquainted with that type of operation and how they process the fruit. That is one of the primary duties of an inspector working in a packinghouse.

Q. Where is that packinghouse located?

A. Princeton, Florida: just west of U.S. Highway No. 1, across the Florida East Coast Railroad tracks.

Q. Is the method of operation of the packinghouse maintained by the Florida Lime and Avocado Growers Asso-[fol. 26] ciation similar to the operation of the packinghouse operated by the South Florida Growers Association?

A. They are similar in one sense, in that they have the same type of machinery. They size by weight mechanically, but they do not have the facilities for refrigeration as does the South Florida Growers Association, and also their fruit is stacked on the packinghouse floor. Incidentally, when they stack it on the packinghouse floor it is accessible at all times for the inspector to make periodical inspections.

Q. At what point in the operation of the packinghouse operated by the Florida Lime and Avocado Growers Association at Princeton is the official inspection made?

A. At the end of the conveyor just before they are lidded up. It is very similar to the operation at the South Florida Growers packinghouse.

Q. Are your inspectors given any specific instructions as to the number of containers they should inspect at the Florida Lime and Avocado Growers packinghouse at Princeton?

A. No specific instructions as to the number of samples that they may run.

Q. Or as to the number of containers that they should sample?

A. We consider the containers the samples. Our inspections are made on a container basis. There is no specified requirement, but it is the duty of the inspector to run as many samples as possible, whether it is on avocados or any other commodity. In other words, they run as [fol. 27] many as they possibly can, and that is their standard instruction.

Q. Is the same instruction given to your inspectors who are stationed at the packinghouse operated by the South Florida Growers Association?

A. Yes.

Mr. Fourt: You may cross examine.

Cross examination.

By Mr. Ferguson:

Q. Mr. Wimbish, you described the contents of an inspection certificate. I show you an inspection certificate which has been marked here as plaintiffs' exhibit 3 for identification. Is this one of your inspection certificates?

A. Yes; this is the type of certificate used by us on avocado inspections.

Q. Are you familiar with the signatures of your inspectors?

A. Yes. This one is signed by one of my men, Douglas R. Pfeiffer.

Q. That is the colored copy that goes with the truck?

A. Yes.

Q. There is another copy that goes to the shipper?

A. The shipper gets two copies if he desires, but the truck can get one; in other words, the trucker can get two and the shipper one or the shipper can get one and the trucker two. It is up to them as to which one gets the two copies.

Q. Referring back to this plaintiffs' exhibit 3 for identifi-
[fol. 28] cation, I will ask you to state what do the letters "MSO" mean?

A. Those letters "MSO" mean that the avocados meet the Florida Avocado Administrative Committee's number two grade. The "MSO" actually means that the avocados meet the "Secretary's Order".

Q. That means the Secretary of Agriculture of the United States?

A. That is right. That is put on all of our certificates when they meet the requirements. If they fail to meet the Secretary's Order, we don't put it on there.

Q. If the lot of avocados fail to meet the Secretary's regulations, you would put a different kind of notation on the certificate?

A. Yes.

Q. What do you do in that case?

A. We inform the "applicant" that it doesn't conform with the Secretary's Order, and if he doesn't do anything about it and says, "I want to ship it anyway and I want

a certificate"—then we write under Remarks on the certificate just the reverse of what is on this certificate, that is, that it fails to meet the Secretary's Order, and that is stamped on the certificate.

Q. Is the shipper permitted to make the shipment anyway?

A. Yes, he can make the shipment, because we can't stop him from shipping it. When that happens, I will immediately notify the manager of the committee as to what went on. That is my duty as supervisor. It is my [fol. 29] duty as supervisor to report any violation to the manager of the committee, and then the committee takes the necessary steps. That is as far as we go with it.

Q. You stated, Mr. Wimbish, that when one of your inspectors is in doubt about the variety of a particular fruit, he calls upon you for advice; is that correct?

A. Yes.

Q. I call your attention to an incident that happened on December 5, 1957, which incident arose at the plant of Florida Lime and Avocado Growers, Inc. packinghouse. Do you recall that on that date there arose a question because the grower claimed that the avocados were Booth 5s and your inspector claimed that they were Booth 3s? Do you recall that incident?

A. Along about the fifth of December?

Q. Yes; involving about one hundred bushels of avocados.

A. I can't say whether it was exactly that date or not, but I do recall very definitely that there were a lot of avocados that the "applicant" claimed were Booth 5s, and he was dissatisfied with the decision of the inspector, so the inspector called on me to come up there and make a decision as to the variety. This was at the Florida Lime and Avocado Growers packinghouse.

Q. Your inspector called you up?

A. Yes.

Q. Did you determine that your inspector was right?

A. Yes. In my opinion they were Booth 3s variety and [fol. 30] not Booth 5 variety. That was my decision. However, I think they were still dissatisfied, which they had a perfect right to be, because if they want to go against

my decision they have a right to take it up with the committee and have the committee make a final decision as to that particular fruit in case such a question arises.

Q. What is that committee called?

A. That committee is called the Variety Index Panel. That panel is appointed by the committee to determine and decide the varieties of fruit. When a situation of this kind occurs, I get in touch with Mr. Biggar, the manager of the Avocado Administrative Committee, and I tell him that they are dissatisfied with my decision, and then he in turn tries to get in touch with each one of these members of the panel committee. This panel is really called the Variety Identifying Committee, and they make the final decision. In this particular case the committee agreed with the inspection service as to that particular variety.

Q. What happened to the avocados?

A. They didn't ship them. It was quite a loss, and it was too bad, however, they still didn't comply with the regulations.

Q. That is your understanding of the procedure?

A. That is right.

Mr. Ferguson: That is all.

Mr. Fourt: No further questions.

And Further Deponent Saith Not.

Registered
Avocado Handler

Registered
Avocado Handler

NO. 7

This Is To Certify That Florida Lime & Avocado Growers, Inc.

Mailing Address P. O. Box 176, Princeton, Fla.

Inspection Point Princeton

has complied with the provisions prescribed in the Avocado Marketing Agreement and Order and is hereby authorized to operate as a Handler of Avocados and to pack Avocados for market or transportation during the shipping season beginning 4/1/57 and ending 3/31/58

1957-58
SEASON

Avocado Administrative Committee
1102 NORTH KROME AVENUE
HOMESTEAD, FLORIDA

ISSUED April 9, 1957

Manager

[Vol. 1]

PLAINTIFFS' EXHIBIT 1

319

Registered Avocado Handler

NO. 18

This Is To Certify That South Florida Growers Assn., Inc.

Mailing Address P. O. Box 468, Goulds, Fla.

Inspection Point Goulds

has complied with the provisions prescribed in the Avocado Marketing Agreement and Order and is hereby authorized to operate as a Handler of Avocados and to pack Avocados for market or transportation during the shipping season beginning 4/1/57 and ending 3/31/58

1957-58
SEASON

Avocado Administrative Committee
1102 NORTH KROME AVENUE
HOMESTEAD, FLORIDA

ISSUED April 2, 1957

326
[Fol. 2]

PLAINTIFF'S EXHIBIT 2

[fol. 3]

PLAINTIFFS' EXHIBIT 3

U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
FLORIDA DEPARTMENT OF AGRICULTURE
CITRUS AND VEGETABLE INSPECTION DIVISION

No. B- 66158

TRUCK INSPECTION CERTIFICATE

The undersigned, on the date specified made personal inspection of samples believed by me to be representative of the lot of products hereinafter described and do hereby certify that the conditions, at the said time on said date, pertaining to such products as shown by said inspection were as stated below:

LOCATION: PRINCETON, Fla. TRAILER NUMBER: INITIAL & NO. Fla 1-0-853

INSPECTION BEGUN: 9:00 AM (HOUR) November 14 1957 (DATE) COMPLETED: 2:30 PM (HOUR) November 15, 1957 (DATE)

LOCALITY: Florida Lime + Avocado Growers Inc ADDRESS: PRINCETON Florida

PRODUCT	NO. PACKAGES	KIND OF CONTAINER	[illegible]	[illegible]
			Stamped	1 Lots
Avocados	1874	½ Bu F.B. Box	Lot 59 HSC 20	1874

REMARKS: Meets Florida ANC No 2 Grade
MSO.

Douglas K. Griffin
(INSPECTOR)

Miles @ 7-½¢ per mile = $

1102 NORTH KROME AVENUE
HOMESTEAD, FLORIDA

ISSUED April 9 1957

[10]. 4] PLAINTIFFS' EXHIBIT 4

SUMMARY OF AVOCADO SHIPMENTS
BY VARIETIES AND BY WEEKS
1958-59 SEASON
(55# box Equivalents)

Line	Week Ending	Fuchs	Pollocks & Simmonds	Trapp	Waldin	Pinelli	Tonnage	Booth 8	Simpson	Lula	Booth 7 Booth 7B	Hickson	Collinson
1	Jun 16-Jun 27	75											
2	Jul 9	1991	336										
3	Jul 16	2154	1090										
4	Jul 23	3216	5134										
5	Jul 30	2132	4495										
6	Aug 6	1207	4783										
7	Aug 13	272	5776	159	170								
8	Aug 20	200	2313	684	3296								
9	Aug 27	246	1286	4301	4450	151							
10	Sep 3	25	271	1646	10260	332							
11	Sep 10	5	250	2055	7119	154	488						
12	Sep 17	4	99	2284	13077	405	366	496					
13	Sep 24		95	2100	9888	23	784	3362					
14	Oct 1		8	392	4814	49	2133	2334	314				
15	Oct 6			274	1108		965	11072	277	1402			
16	Oct 15			36	656	1		4653		1002	3619		
17	Oct 22		36	32	1845	9	2	23035	364	5724	1515	316	158
18	Oct 29		18	25	268			10231	100	3528	7289	769	107
19	Nov 5			2	162			6394	26	3906	4442	5180	123
20	Nov 12				21			8515		3600	8515	1867	104
21	Nov 19				26			9075	18	10659	9118	1573	210
22	Nov 26							1945	14	9225	5343	783	56
23	Dec 3							2329		5557	8051	2022	48
24	Dec 10							1021		4532	8510	2721	1303
25	Dec 17							390		7667	3925	1722	363
26	Dec 24							12		4237	1271	288	81
27	Dec 31							45		3744	4099	197	110
28	Jan 7							228		5723	1660	66	56
29	Jan 14							41		11671	695	39	270
30	Jan 21							16		11476	229	9	439
31	Jan 28									8763			138
32	Feb 4									7060	29		142
33	Feb 11									4959			36
34	Feb 18									2368			
35	Feb 25									1121			
36	Mar 3									1115			
37	Mar 10									407			
38	Mar 17									4			
39	Mar 24												
40	Mar 31									27			
	TOTAL	11581	24059	13028	80239	906	4814	85494	1093	124237	68613	18425	11638

[fol. 5]

Monroe	Hall	Avon	Herman	Booth 3	Booth 5	Choquette	Taylor	Booth 1	Linda	Wagner	Seedling	Other	TOTAL	Line
											21	--	96	1
											27	10	2304	2
											149	14	3416	3
											105	35	6912	4
											245	31	0953	5
											590	32	8008	6
											419	23	7319	7
											1491	52	20042	8
											1590	46	12060	9
											1362	41	13937	10
											1246	80	11171	11
											1293	81	17891	12
											1050	283	13133	13
											1000	103	8997	14
											1401	420	16897	15
											784	383	11133	16
364	221	70									477	23	34624	17
153	190	29	30								445	309	24684	18
	185	84	16	558							276	392	22472	19
	204	17	180	1548	655		5				188	141	29633	20
	170	209	35	959		105		104			191	499	36269	21
	85	503	256	4214	62	93	145	624			13	145	20119	22
	177	629	66	2405		24	166	2256			192	567	29101	23
1	147	18	93	3854	560	516	377	2544	196		99	387	24298	24
	37		30	806	369	39	470	4413	28		29	281	23601	25
11	47	10	23	863	125	403	2089	4012	193		22		22104	26
78	40		165	1030	4	189	1152	6618	202	10	144	181	16264	27
253	38			305	9	496	1852	5825	38	85	176	328	17672	28
1084	4		13	132	9	397	1748	1548	53	329	319	38	21675	29
196	6		13	33		61	1750	244	85	483	416	28	17900	30
633						4	996	121	230	609	20	133	11933	31
656					15	5	1978	154	461	712		126	10019	32
98					2	27	1733	191	555	861	152	302	9430	33
171							659	192	2	402	5	288	5928	34
105						9	18	2	23	67	53	397	2992	35
							22	1		13	4	193	640	37
							5	2	1	24	7	57	110	38
										13		11	24	39
							29	28		16			100	40
3801	1551	1569	972	17093	1808	2368	15344	28321	2117	3487	16391	6837	516103	TOTAL

Plaintiffs' Exhibit 5

WEEKLY SUPPLY OF AVOCADOS
1955-56 Season
By Points of Origin
(55# Bushels)

		California*	Florida	Cuba**	U. S. Total
April	9	56,250			56,250
	16	55,500			55,500
	23	54,500			54,500
	30	53,250			53,250
May	7	52,500			52,500
	14	51,000			51,000
	21	49,000			49,000
	28	47,500			47,500
June	4	45,500			45,500
	11	41,000			41,000
	18	34,000			34,000
	25	26,000		12,000*	38,000
July	2	21,500	90	13,944*	35,540
	9	19,500	2,364	16,677*	38,541
	16	18,000	3,416	25,709	47,125
	23	17,500	6,612	12,727	36,839
	30	17,000	6,952	21,716	45,669
Aug.	6	17,000	6,608	17,716	41,324
	13	16,500	7,319	12,882	36,701
	20	16,500	5,042	13,621	35,163
	27	16,000	12,080	11,163	39,243
Sept.	3	16,000	13,937	7,171	37,108
	10	16,000	11,17	3,171	30,342
	17	15,500	17,8.	1,939	35,320
	24	15,500	13,133		28,633
Oct.	1	15,500	8,997		24,497
	8	15,500	16,897		32,397
	15	15,500	11,133		26,633
	22	15,000	34,624		49,624
	29	14,500	24,684		39,184
Nov.	5	14,000	22,472		36,472
	12	12,000	29,635		41,635
	19	10,000	36,239		46,239
	26	5,000	20,115		25,115
Dec.	3	8,000	25,101		33,101
	10	10,000	24,298		34,298
	17	10,500	23,691		34,191
	24	5,000	12,104		17,104
	31	9,000	16,264		25,264
Jan.	7	12,000	17,672		29,672
	14	14,000	21,675		35,675
	21	16,500	17,900		34,400
	28	18,000	11,933		29,933
Feb.	4	19,000	10,019		29,019
	11	20,000	9,430		29,430
	18	20,000	5,926		25,926
	25	20,000	2,992		22,992
Mar.	3	20,000	1,698		21,698
	10	20,000	640		20,640
	17	20,000	110		20,110
	24	20,000	24		20,024
	31	20,000	100		20,100
Total		1,167,500	516,103	170,436	1,874,039

* Estimated from monthly production data.
** Unpublished records of U. S. D. A. Inspection Service.

[fol. 7]

Plaintiffs' Exhibit 6

REGULATORY OPERATIONS

The Marketing Agreement and Order regulating the handling of avocados grown in South Florida permits the issuance of the following types of regulations:

1. Maturity Regulations
   S/S 969.51 (1) "Prohibit, prior to such time as shall be specified, the handling of any size or sizes of any variety or varieties of avocados grown in District 1 or District 2."

2. Grade and Size Regulations
   S/S 969.51 (2) "Prohibit the handling of any variety or varieties of avocados grown in District 1 or District 2 which do not meet such quality and maturity standards as shall be prescribed."

3. Container Regulations
   S/S 969.51 (3) "Fix the size, capacity, weight, dimensions, or pack of the container or containers which may be used in the packaging, and the transportation, sale, shipment or other handling of avocados."

All of these forms of regulation were recommended and used during the 1956-57 season, plus a modified and expanded schedule of procedural rules as authorized by S/S 969.28(c) of the Order.

MATURITY REGULATIONS

Shipping weights, dates and sizes were established for a total of 45 named varieties and for two general classifications of seedlings and unlisted varieties. The seedling regulations were as follows:

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations:

West Indian Type:	None before June 1. June 1 to June 18, none smaller than 16 oz. June 18 to July 16, none smaller than 14 oz. July 16 to Sept. 10, none smaller than 12 oz. After Sept. 10, no restrictions.
Guatemalan Type and Guatemalan x W. Indian Hybrids:	None before Sept. 3. Sept. 3 to Oct. 1, none smaller than 14 oz. Oct. 1 to Dec. 17, none smaller than 12 oz. After Dec. 17, no restrictions.

Exceptions applicable to seedlings and unlisted varieties: Avocados which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

The following shipping schedule was applied to named varieties during the 1956-57 season:

Variety	Date A	Min Wt	Min Dia	Date B	Min Wt	Min Dia	Date C	Min Wt	Min Dia	Date D
Fuchs	6-18	12	3 1/16	7-2	10	2 13/16	7-16	8	2 9/16	8-4
Pollock	7-2	18	3 10/16	7-16	15	3 6/16	7-30	12	3 1/16	8-[illegible]
Simmonds	7-2	16	3 9/16	7-16	14	3 7/16	7-30	12	3 4/16	8-[illegible]
Nadir	7-2	14	3 5/16	7-16	12	3 2/16	7-30	9	2 12/16	8-[illegible]
Hardee	7-2	16	3 5/16	7-16	14	3 2/16	7-30	10	2 12/16	8-[illegible]
Trapp	7-23	14	3 9/16	8-6	12	3 7/16	8-20	10	3 3/16	9-[illegible]
Waldin	7-30	16	3 9/16	8-13	14	3 6/16	8-27	10	3 1/16	10-[illegible]
Peterson	8-6	12	3 6/16	8-20	10	3 2/16	9-3	8	2 14/16	9-[illegible]
Pinelli	8-20	18	--	8-27	16	--	9-3	12	--	9-[illegible]
Tonnage	8-20	14	--	8-27	12	--	9-3	10	--	9-[illegible]
Fairchild	8-20	16	3 10/16	9-3	14	3 7/16	9-17	10	3 0/16	10-[illegible]
(Booth 8	9-17	15	3 6/16	9-24	13	3 4/16	10-15	14	3 1/16	--
(Booth 8	--	--	--	--	--	--	11-5	9	2 14/16	11-[illegible]
Nirody	9-17	18	3 15/16	10-1	15	3 11/16	10-15	10	3 3/16	11-[illegible]
Simpson	10-1	16	--	10-15	14	--	10-29	10	--	11-[illegible]
(Lula	10-8	18	3 10/16	10-22	16	3 7/16	11-5	14	3 4/16	--
(Lula	--	--	--	--	--	--	12-3	11	2 15/16	12-[illegible]
Rue	10-8	30	4 3/16	10-15	24	3 15/16	10-29	18	3 9/16	11-[illegible]
Black Prince	10-8	16	--	10-22	14	--	11-5	10	--	11-[illegible]
Booth 7	10-15	16	3 10/16	10-29	14	3 8/16	11-12	10	3 2/16	12-[illegible]
Sherman	10-15	16	--	10-29	14	--	11-12	10	--	12-[illegible]
Vaca	10-15	16	3 9/16	10-29	14	3 7/16	11-12	10	3 0/16	12-[illegible]
Marcus	10-15	32	--	--	--	--	--	--	--	11-[illegible]
Hickson	10-22	14	3 4/16	11-5	11	3 0/16	11-19	9	2 13/16	12-[illegible]
Collinson	10-22	16	3 11/16	11-5	14	3 8/16	11-19	10	3 1/16	12-[illegible]
Avon	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-[illegible]
Booth 5	10-22	16	3 11/16	11-5	14	3 9/16	11-19	9	3 1/16	12-[illegible]
Blair	10-22	16	--	11-5	14	--	11-19	9	--	12-[illegible]
Nelson	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-[illegible]
Monroe	10-29	24	--	11-26	20	--	12-17	14	--	1-[illegible]
Hall	11-5	20	3 9/16	11-19	16	3 5/16	12-3	14	3 3/16	12-[illegible]
Herman	11-5	16	3 9/16	11-19	14	3 7/16	12-3	10	3 1/16	12-[illegible]
Winslowson	11-5	18	3 14/16	11-19	16	3 12/16	12-3	10	3 2/16	12-[illegible]
Booth 10	11-5	16	--	11-19	14	--	12-3	9	--	12-[illegible]
Booth 11	11-5	16	--	11-19	14	--	12-3	9	--	12-[illegible]
Ajax (Booth 7B)	11-12	18	3 12/16	11-26	15	3 9/16	12-10	11	3 3/16	12-[illegible]
Booth 3	11-19	16	3 9/16	12-3	14	3 7/16	12-17	10	3 1/16	1-[illegible]
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-[illegible]
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-[illegible]
Dunedin	11-19	16	3 10/16	12-3	14	3 8/16	12-17	9	2 15/16	1-[illegible]
Choquette	11-26	24	--	12-10	18	--	12-17	14	--	12-[illegible]
Linda	12-10	18	--	12-24	15	--	1-7	12	--	1-[illegible]
Byars-1	12-10	16	--	12-24	14	--	1-7	9	--	1-[illegible]
Nabal	12-10	14	3 8/16	12-24	12	3 5/16	1-7	8	2 14/16	1-[illegible]
Wagner	12-17	12	3 5/16	12-31	10	3 2/16	1-14	8	2 14/16	2-[illegible]
Schmidt	1-28	16	--	2-11	14	--	--	--	--	2-[illegible]
Itzamna	2-25	--	--	--	--	--	--	--	--	3-[illegible]

Date "A" No fruit may be shipped before this date.
Date "D" No restrictions on size or weight after this date.
Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
All weights in ounces, diameters in inches.

[fol 9]

Plaintiffs' Exhibit 7

SUMMARY OF AVOCADOS HANDLED
By Varieties and by Weeks
1956-57 Season
55# Box Equivalent*

LINE	Week Ending	Fuchs	Pollocks & Simonds	Trapp	Waldin	Pinelli	Tonnage	Booth 8	Simpson	Lula	Booth 7 Booth 7B	Hickson	Collinson
1	Jun 1 Jun 30	5											
2	Jul 7	195											
3	Jul 14	650	25										
4	Jul 21	677	1310										
5	Jul 28	723	3370										
6	Aug 4	377	4770										
7	Aug 11	896	2366										
8	Aug 18	289	1468	89	485								
9	Aug 25	105	645	1605	1323								
10	Sep 1	56	496	968	4905								
11	Sep 8	13	270	1308	2981	47	447						
12	Sep 15	12	173	1741	6945	16							
13	Sep 22		21	1972	6060		10	758					
14	Sep 29		16	812	5143	135	461	4838					
15	Oct 6		28	1099	4741		1103	5251	18				
16	Oct 13		1	695	4240	2	2340	4510		433			
17	Oct 20			203	698		32	10872	62	733	2506		
18	Oct 27			25	734		110	4117	187	6130	1749	1739	3323
19	Nov 3			28	172		2	3877	189	4746	6093	757	2235
20	Nov 10			2	8		2	5945	10	5097	2047	2495	3493
21	Nov 17				8		2	2363		7069	10315	1329	799
22	Nov 24				5			1507		6482	1831	1308	1523
23	Dec 1							5296		8817	4326	2237	1124
24	Dec 8							2464		14337	4525	1907	1007
25	Dec 15							1598	22	11868	2611	1983	401
26	Dec 22							1090	22	4369	668	987	317
27	Dec 29							409		4918	700	394	632
28	Jan 5							269	4	11026	1440	611	1556
29	Jan 12							70		10961	643	466	1154
30	Jan 19							97		9286	113	251	454
31	Jan 26									6289	25	4	153
32	Feb 2							9		7026	10		243
33	Feb 9							2		8129	8	9	135
34	Feb 16							2		8126	13		78
35	Feb 23									6137	10	8	5
36	Mar 2									1077			
37	Mar 9									1104			
38	Mar 16									490			
39	Mar 23									53			
40	Mar 31									3			
	TOTAL	3798	14959	10547	38148	200	4509	55344	514	145329	39633	16485	18332

[fol. 10]

Avon	Monroe	Hall	Booth 5	Herman	Booth 3	Booth 1	Choquette	Taylor	Linda	Wagner	Seedling	Other	TOTAL *	LINE
													5	1
													195	2
											4		679	3
											27	91	2105	4
											57	22	4172	5
											185	3	4835	6
											471	2	4035	7
											647	4	2932	8
											676	62	4416	9
											563		6988	10
											573	24	5663	11
											499	11	9097	12
											703		9524	13
											944	36	12385	14
											888	141	13269	15
											1605	389	14212	16
											848	576	16530	17
39											1270	138	19567	18
	8										428	254	18789	19
36	15	971	15								353	393	20584	20
	657	569	9	75							303	253	24351	21
365	164	328	23	19	473	778					246	105	15157	22
4	231	242	267	174	1576	1489	284	76			186	716	27045	23
	103	244	84	329	1414	3838	137	34			217	582	31222	24
		243	43	100	900	1029	457	692	82		211	130	22370	25
		67	9		1531	415	117	309			21	35	9957	26
		14	2	5	1294	1477	100	574	31		100	91	10741	27
		235	114	34	2456	2255	209	2740	55		229	12	23245	28
	96	104	90	107	1269	2554	233	3257	321		166	212	21723	29
		46	3		319	1087	19	3590	113	138	131	145	15792	30
	48	6	8	1	165	1341	121	2969	190	34	37	212	11603	31
	332	79	21	9	272	843	60	3765	200	26	96	68	13259	32
	510	17		3	38	773	75	3437	215	1249	78	152	14830	33
	448	19		7	22	204	11	1131	510	557	104	431	11663	34
11	253				20	133	29	1524	546	206	66	177	9125	35
	112				43	42		1021	343	126	105	862	3731	36
	152	9			15	37		157	13	46	52	977	2562	37
	15				7				59	57	11	156	796	38
									21		20	61	155	39
						3					4	50	60	40
455	3344	3193	688	863	11814	18298	1852	25277	2699	2439	13124	7575	439419	TOTAL

* Lines 1-13 show net quantities shipped, based on 3 flats equal 1 multilayer, 4 flats equal one bushel.

Lines 14-40 show approximate gross quantities handled (including gradeout) as reported weekly by handlers.

COMPOSITE SUPPLY OF AVOCADOS
By Season and Point of Origin
(Bushels)

1955-56 Season					1956-57 Season				
Week Ending	California	Florida*	Cuba	U. S. Total*	Week Ending	California	Florida	Cuba	U. S. Total
Apr 9	56,250			56,250	Apr 7	22,000			22,000
16	55,500			55,500	14	21,900			21,900
23	54,500			54,500	21	21,200			21,200
30	53,250			53,250	28	20,600			20,600
May 7	52,500			52,500	May 5	19,500			19,500
14	51,000			51,000	12	18,000			18,000
21	49,000			49,000	19	14,000			14,000
28	47,500			47,500	26	9,600			9,600
Jun 4	45,500			45,500	Jun 2	7,400			7,400
11	41,000			41,000	9	7,000			7,000
18	34,000			34,000	16	7,000			7,000
25	26,000		12,000	38,000	23	7,000		2,640	9,640
Jul 2	21,500	162	13,944	35,606	30	7,100	5	6,036	13,141
9	19,500	2,351	16,677	38,528	Jul 7	7,200	195	8,773	16,168
16	18,000	3,470	25,709	47,179	14	7,400	679	12,399	20,478
23	17,500	7,000	12,727	37,227	21	7,500	2,105	15,967	25,572
30	17,000	6,513	21,716	45,229	28	7,600	4,172	17,153	28,925
Aug 6	17,000	6,946	17,716	41,662	Aug 4	8,000	4,835	17,387	30,222
13	16,500	7,213	12,882	36,595	11	8,200	4,035	15,997	28,232
20	16,500	7,991	13,621	38,112	18	8,500	2,982	14,642	26,124
27	16,000	12,410	11,163	39,573	25	8,800	4,416	15,270	28,486
Sep 3	16,000	14,459	7,171	37,630	Sep 1	8,800	6,988	14,103	29,891
10	16,000	11,557	3,171	30,728	8	9,200	5,663	10,691	25,554
17	15,500	17,446	1,939	34,885	15	9,700	9,097	5,065	23,862
24	15,500	12,876		28,376	22	10,100	9,524	2,696	22,320
Oct 1	15,500	12,048		27,548	29	10,800	9,697		20,497
8	15,500	14,027		29,527	Oct 6	11,000	9,974		20,974
15	15,500	10,544		26,044	13	11,000	10,851		21,851
22	15,000	34,740		49,740	20	10,200	14,131		24,331
29	14,500	24,202		38,702	27	9,000	15,368		24,368
Nov 5	14,000	21,715		35,715	Nov 3	7,500	12,524		20,024
12	12,000	28,894		40,894	10	3,000	17,208		20,208
19	10,000	36,682		46,682	17	5,000	19,793		24,793
26	5,000	18,499		23,499	24	5,500	12,013		17,513
Dec 3	8,000	22,483		30,483	Dec 1	6,000	21,515		27,515
10	10,000	24,564		34,564	8	5,500	24,481		29,981
17	10,500	25,290		35,790	15	3,000	20,614		23,614
24	5,000	9,655		14,655	22	5,500	9,278		14,778
31	9,000	15,180		24,180	29	7,700	8,011		15,711
Jan 7	12,000	18,153		30,153	Jan 5	9,200	17,411		26,611
14	14,000	21,075		35,075	12	10,400	16,974		27,374
21	16,500	17,096		33,596	19	11,700	12,804		24,504
28	18,000	11,591		29,591	26	12,700	8,646		21,346
Feb 4	19,000	9,526		28,526	Feb 2	14,000	11,097		25,097
11	20,000	9,017		29,017	9	15,000	12,142		27,142
18	20,000	5,601		25,601	16	16,000	8,760		24,760
25	20,000	2,751		22,751	23	17,000	6,180		23,180
Mar 3	20,000	1,658		21,658	Mar 2	17,500	3,584		21,084
10	20,000	678		20,678	9	17,500	2,216		19,716
17	20,000	101		20,101	16	17,500	798		18,298
24	20,000	22		20,022	23	17,000	108		17,108
31	20,000	96		20,096	31	16,000	53		16,053
	1,187,500	506,282	170,436	1,864,218		575,500	360,927	158,819	1,095,246

Source: California shipments estimated from monthly production data supplied by Calavo Growers of California. Florida shipments from Avocado Administrative Committee files (does not reflect corrections or amendments to certificates). Cuban shipments from unpublished U. S. D. A. records.

* 1955-56 Florida quantities revised to reflect standard base of 4 flats = one bushel, one multilayer equals 3 flats.

[fol. 12]

PLAINTIFFS' EXHIBIT 9

AVOCADO SHIPPING DATES

1957-58 Season

(Issued October 8, 1957)

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2
Trapp	7-29	14	3 9/16	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23
Fairchild	8-26	16	3 10/16	9-9	14	3 7/16	9-23	11	3 2/16	10-7
(Booth 8	9-16	15	3 6/16	9-30	13	3 4/16	10-14	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	10-28	10	2 15/16	11-18
Nirody	9-16	18	3 15/16	9-30	15	3 11/16	10-14	12	3 6/16	11-4
Simpson	9-30	16		10-14	14		10-28	10		11-18
Rue	10-7	30	4 5/16	10-14	24	3 15/16	10-28	18	3 9/16	11-11
B. Prince	10-7	16		10-21	14		11-4	10		11-25
(Lula	10-7	18	3 10/16	10-21	16	3 7/16	11-4	14	3 4/16	--
(Lula	--	--	--	--	--	--	11-18	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Sherman	10-14	16		10-28	14		11-11	10		12-2
Vaca	10-14	16	3 9/16	10-28	14	3 7/16	11-11	10	3 0/16	12-2
Marcus	10-14	32								11-25
Hickson	10-21	14	3 4/16	11-4	12	3 1/16	11-18	10	2 15/16	12-9
Collinson	10-21	16	3 11/16	11-4	14	3 8/16	11-18	10	3 1/16	12-9
Avon	10-21	14	3 8/16	11-4	12	3 5/16	11-18	9	2 15/16	12-9
Booth 5	10-21	16	3 11/16	11-4	14	3 9/16	11-18	10	3 3/16	12-9
Blair	10-21	16		11-4			11-18			12-9
Nelson	10-21	14	3 8/16	11-4	12	3 5/16	11-18	10	3 1/16	12-9
Winslowson	10-28	18	3 14/16	11-11	16	3 12/16	11-25	10	3 2/16	12-24
Monroe	10-28	24		11-25	20		12-16	14		1-6
Hall	10-21	24	3 13/16	11-4	18	3 7/16	12-2	14	3 3/16	12-24
Herman	11-4	16	3 9/16	11-18	14	3 7/16	12-2	10	3 1/16	12-24
Booth 10	11-4	16		11-18	14		12-2	10		12-24
Booth 11	10-28	16	3 12/16	11-11	14	3 9/16	12-2	10	3 3/16	12-24
Ajax(B. 7B)	11-11	18	3 12/16	11-25	15	3 9/16	12-9	11	3 3/16	12-31
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-31
Booth 1	11-18	16	3 11/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Taylor	11-18	14	3 4/16	12-2	12	3 2/16	12-16	9	2 13/16	1-6
Dunedin	11-18	16	3 10/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Choquette	10-28	30	4 5/16	11-18	22	3 15/16	12-2	18	3 11/16	1-6
Linda	12-9	18		12-23	15		1-6	12		1-20
Byars #1	12-9	16		12-23	14		1-6	10		1-27
Nabal	12-9	14	3 8/16	12-23	12	3 5/16	1-6	9	3 0/16	1-27
Wagner	12-16	12	3 5/16	12-30	10	3 2/16	1-13	8	2 14/16	2-3
Schmidt	1-27	16		2-10	14					2-24
Itzamna	2-24									2-24

Column "A" No fruit may be shipped before this date.

Column "D" No restrictions on size or weight on or after this date.

All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations

West Indian Type:	None to be shipped before June 3
	June 3 to June 17, none smaller than 16 oz.
	June 17 to July 15, none smaller than 14 oz.
	July 15 to Sept. 9, none smaller than 12 oz.
	On or after Sept. 9, no size restrictions
Guatemalan Type and Guatemalan x W. Indian Hybrids:	None to be shipped before Sept. 9
	Sept. 9 to Oct. 7, none smaller than 14 oz.
	Oct. 7 to Dec. 23, none smaller than 12 oz.
	On or after Dec. 23, no size restrictions

Exceptions applicable to seedlings and unlisted varieties: Avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

AAC 417

[fol. 13]

PLAINTIFFS' EXHIBIT 10

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-14 — September 30, 1957

Summary of Avocado Shipments
from the
South Florida Production Area

1957-58 Season		1956-57 Season	
Period	Bushels	Period	Bushels
April 1-July 27	8,430	April 1-July 28	7,156
July 28-Aug. 3	2,974	July 29-Aug. 4	4,835
Aug. 4-10	6,575	Aug. 5-11	4,035
Aug. 11-17	5,493	Aug. 12-18	2,982
Aug. 18-24	8,086	Aug. 19-25	4,416
Aug. 25-31	11,509	Aug. 26-Sept. 1	6,988
Sept. 1-7	14,805	Sept. 2-8	5,663
Sept. 8-14	11,838	Sept. 9-15	9,097
Sept. 15-21	12,358	Sept. 16-22	9,524
Sept. 22-28	11,054	Sept. 23-29	9,697
Total	93,122		64,393

Avocado Shipments
by
Type of Container

	Standard Flats	Multilayer Boxes
Sept. 15-21, 1957	45,905	1,176
Sept. 22-28, 1957	40,911	1,102
Sept. 23-29, 1956	36,148	881

Distribution
1957-58 Season

Period	Total Units Packed.	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-July 27, 1957	33,715	11,201	33.2
July 28-Aug. 3	11,897	4,038	33.9
Aug. 4-10	26,301	4,048	15.4
Aug. 11-17	21,972	4,844	22.0
Aug. 18-24	32,343	3,469	10.7
Aug. 25-31	46,036	4,724	10.3
Sept. 1-7	59,219	4,471	7.5
Sept. 8-14	47,353	3,181	6.7
Sept. 15-21	49,433	5,233	10.5
Sept. 22-28	44,217	3,120	7.0
Total	372,486	48,329	12.9

*Does not include drop lots transported by common or contract carriers.

AAC-412

David M. Biggar, Manager
Avocado Administrative Committee

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-18 — October 28, 1957

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season	
Period	Bushels	Period	Bushels
April 1-Aug. 31	43,067	April 1-Sept. 1	30,412
Sept. 1-7	14,805	Sept. 2-8	5,663
Sept. 8-14	11,838	Sept. 9-15	9,097
Sept. 15-21	12,358	Sept. 16-22	9,524
Sept. 22-28	11,054	Sept. 23-29	9,697
Sept. 29-Oct. 5	18,083	Sept. 30-Oct. 6	9,974
Oct. 6-12	17,974	Oct. 7-13	10,851
Oct. 13-19	26,417	Oct. 14-20	14,131
Oct. 20-26	20,986	Oct. 21-27	15,368
Total	176,582		114,717

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Oct. 13-19, 1957	99,562	2,035
Oct. 20-26, 1957	75,842	2,701
Oct. 21-27, 1956	55,964	1,836

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Aug. 31, 1957	172,264	32,324	18.7
Sept. 1-7	59,219	4,471	7.5
Sept. 8-14	47,353	3,181	6.7
Sept. 15-21	49,433	5,233	10.5
Sept. 22-28	44,217	3,120	7.0
Sept. 29-Oct. 5	72,334	3,847	5.3
Oct. 6-12	71,897	5,230	7.2
Oct. 13-19	105,667	3,924	3.7
Oct. 20-26	83,945	5,259	6.3
Total	706,329	66,589	9.4

*Does not include drop lots transported by common or contract carriers.

AAC-423

David M. Biggar, Manager
Avocado Administrative Committee

[fol. 15]

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-22 — November 25, 1957

Summary of Avocado Shipments
from the
South Florida Production Area

1957-58 Season		1956-57 Season		1955-56 Season	
Period	Bushels	Period	Bushels	Period	Bushels
Apr. 1-Sept. 28	93,122	Apr. 1-Sept. 29	64,393	Apr. 1-Oct. 1	118,609
Sept. 29-Oct. 5	18,083	Sept. 30-Oct. 6	9,974	Oct. 2-8	16,897
Oct. 6-12	17,974	Oct. 7-13	10,851	Oct. 9-15	11,133
Oct. 13-19	26,417	Oct. 14-20	14,131	Oct. 16-22	34,624
Oct. 20-26	20,986	Oct. 21-27	15,368	Oct. 23-29	24,684
Oct. 27-Nov. 2	23,167	Oct. 28-Nov. 3	12,524	Oct. 30-Nov. 5	22,472
Nov. 3-9	22,799	Nov. 4-10	17,208	Nov. 6-12	29,683
Nov. 10-16	28,849	Nov. 11-17	19,793	Nov. 13-19	36,289
Nov. 17-23	26,495	Nov. 18-24	12,013	Nov. 20-26.	20,115
Total	277,892		176,255		314,506

Avocado Shipments
by
Type of Container

	Standard Flats	Multilayer Boxes
Nov. 10-16, 1957	99,429	5,322
Nov. 17-23, 1957	95,700	3,427
Nov. 18-24, 1956	45,167	961

Distribution
1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Sept. 28, 1957	372,486	48,329	13.0
Sept. 29-Oct. 5	72,334	3,847	5.3
Oct. 6-12	71,897	5,230	7.2
Oct. 13-19	105,667	3,924	3.7
Oct. 20-26	83,945	5,259	6.3
Oct. 27-Nov. 2	92,668	5,366	5.8
Nov. 3-9	91,194	6,484	7.1
Nov. 10-16	115,395	5,796	5.0
Nov. 17-23	105,981	6,059	5.7
Total	1,111,567	90,294	8.1

*Does not include drop lots transported by common or contract carriers.

AAC-433

David M. Biggar, Manager
Avocado Administrative Committee

[fol. 16]

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-084

Report No. 57/58-27 — December 30, 195

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season		1955-56 Season	
Period	Bushels	Period	Bushels	Period	Bushels
Apr. 1-Oct. 26	176,582	Apr. 1-Oct. 27	114,717	Apr. 1-Oct. 29	205,947
Oct. 27-Nov. 2	23,167	Oct. 28-Nov. 3	12,524	Oct. 30-Nov. 5	22,472
Nov. 3-9	22,799	Nov. 4-10	17,208	Nov. 6-12	29,683
Nov. 10-16	28,849	Nov. 11-17	19,793	Nov. 13-19	36,289
Nov. 17-23	26,495	Nov. 18-24	12,013	Nov. 20-26	20,115
Nov. 24-30	14,076	Nov. 25-Dec. 1	21,515	Nov. 27-Dec. 3	25,101
Dec. 1-7	22,945	Dec. 2-8	24,481	Dec. 4-10	24,298
Dec. 8-14	25,035	Dec. 9-15	20,614	Dec. 11-17	23,691
Dec. 15-21	16,455	Dec. 16-22	9,278	Dec. 18-24	12,104
Dec. 22-28	8,213	Dec. 23-29	8,011	Dec. 25-31	16,284
Total	364,616		260,154		415,984

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Dec. 15-21, 1957	56,174	3,216
Dec. 22-28, 1957	24,764	2,696
Dec. 23-29, 1956	29,923	707

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Oct. 26, 1957	706,329	66,589	9.4
Oct. 27-Nov. 2	92,668	5,366	5.8
Nov. 3-9	91,194	6,484	7.1
Nov. 10-16	115,395	5,796	5.0
Nov. 17-23	105,981	6,059	5.7
Nov. 24-30	56,304	5,150	9.1
Dec. 1-7	91,782	6,735	7.3
Dec. 8-14	100,141	5,762	5.8
Dec. 15-21	65,822	6,795	10.3
Dec. 22-28	32,852	6,013	18.3
Total	1,458,468	120,749	8.2

*Does not include drop lots transported by common or contract carriers.

AAC-442

David M. Biggar, Manager
Avocado Administrative Committee

[fol. 17]

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-29 — January 13, 1958

Summary of Avocado Shipments
from the
South Florida Production Area

1957-58 Season.		1956-57 Season		1955-56 Season	
Period	Bushels	Period	Bushels	Period	Bushels
Apr. 1-Nov. 30	291,968	Apr. 1-Dec. 1	197,770	Apr. 1-Dec. 3	339,607
Dec. 1-7	22,945	Dec. 2-8	24,481	Dec. 4-10	24,298
Dec. 8-14	25,035	Dec. 9-15	20,614	Dec. 11-17	23,691
Dec. 15-21	16,455	Dec. 16-22	9,278	Dec. 18-24	12,104
Dec. 22-28	8,213	Dec. 23-29	8,011	Dec. 25-31	16,284
Dec. 29-Jan. 4	10,404	Dec. 30-Jan. 5	17,411	Jan. 1-7	17,672
Jan. 5-11	24,979	Jan. 6-12	16,974	Jan. 8-14	21,675
Total	399,999		294,539		455,331

Avocado Shipments
by
Type of Container

	Standard Flats	Multilayer Boxes
Dec. 29-Jan. 4, 1958	30,998	3,539
Jan. 5-11, 1958	79,005	6,970
Jan. 6-12, 1957	62,516	1,793

Distribution
1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Nov. 30, 1957	1,167,871	95,444	8.2
Dec. 1-7	91,782	6,735	7.3
Dec. 8-14	100,141	5,762	5.8
Dec. 15-21	65,822	6,795	10.3
Dec. 22-28	32,852	6,013	18.3
Dec. 29-Jan. 4, 1958	41,615	5,729	13.8
Jan. 5-11	99,915	10,029	10.0
Total	1,599,998	136,507	8.5

*Does not include drop lots transported by common or contract carriers.

AAC-446

David M. Biggar, Manager
Avocado Administrative Committee

PLAINTIFFS' EXHIBIT 11

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

SUMMARY OF AVOCADO SHIPMENTS
FROM THE
SOUTH FLORIDA PRODUCTION AREA

June 1, 1957, through January 11, 1958

As derived from inspection certificates issued by the United States Department of Agriculture in cooperation with the Citrus and Vegetable Inspection Division of the Florida Department of Agriculture.

Shipped to Florida Destinations		Shipped to Out of State Destinations		Total Shipped
Bushels	%	Bushels	%	Bushels
34,127	8.5	365,872	91.5	399,999

AAC-448

David M. Biggar, Manager
Avocado Administrative Committee

[fol. 19]

Plaintiffs' Exhibit 12

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1954-55 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	Piowaty	5	Oct. 14, 1954	Oct. 14, 1954	7.2
Lula	Aladay	5	Oct. 14	Oct. 14	5.5
Lula	Higgins	5	Oct. 14	Oct. 14	5.8
Lula	Biggers	5	Oct. 14	Oct. 14	8.0
Lula	V. Johnson	--	Oct. 13	Oct. 14	6.2
Lula	Higgins	5	Oct. 18	Oct. 18	8.3
Lula	Kent	5	Oct. 18	Oct. 18	6.8
Lula	Kent	5	Oct. 18	Oct. 18	6.9
Lula	--	5	Oct. 18	Oct. 18	6.9
Lula	McRae	5	Oct. 18	Oct. 18	5.2
Lula	Curtis	5	Oct. 18	Oct. 19	7.8
Lula	Curtis	5	Oct. 18	Oct. 19	6.7
Lula	Kip	5	Oct. 18	Oct. 19	6.8
Lula	Womecto	5	Oct. 19	Oct. 20	6.7
Lula	Kersten	6	Oct. 19	Oct. 20	6.6
Lula	Kersten	6	Oct. 19	Oct. 20	6.9
Lula	McBride	5	Oct. 19	Oct. 20	7.0
Lula	Worland	5	Oct. 19	Oct. 21	8.3
Booth 8	--	5	Oct. 26	Oct. 26	7.1
Lula	McMillan	5	Oct. 27	Oct. 28	7.9
Lula	Womecto	5	Oct. 27	Oct. 28	7.1
Lula	Curtis	5	Oct. 27	Oct. 28	9.2
Lula	Nichol	5	Oct. 27	Oct. 28	7.4
Lula	FLAG	5	Oct. 27	Oct. 28	7.8
Lula	Curtis	5	Oct. 27	Oct. 28	7.4
Lula	Gayton	5	Oct. 27	Oct. 29	9.0
Lula	Lillis	5	Oct. 27	Oct. 29	8.1
Lula	Curtis	5	Oct. 27	Oct. 29	8.8
Lula	Higgins	6	Oct. 28	Oct. 29	7.6
Blakeman	DeGuise	6	Oct. 28	Oct. 29	6.3
Blair	Aladay	5	Oct. 28	Oct. 29	8.1
Hall	--	--	Nov. 1	Nov. 1	6.1
Lula	--	--	Nov. 1	Nov. 1	7.6
Booth 1	--	--	Nov. 1	Nov. 1	8.8
Taylor	--	--	Nov. 1	Nov. 1	7.5
Lula	Kip	5	Nov. 1	Nov. 2	7.1
Booth 7	Kip	5	Nov. 1	Nov. 2	5.7
Hickson	--	5	Nov. 9	Nov. 10	8.3
Booth 3	--	3	Nov. 8	Nov. 10	9.6
Booth 3	English	5	Nov. 12	Nov. 12	7.2
Booth 7	English	5	Nov. 12	Nov. 12	7.4
Booth 3	FLAG	5	Nov. 12	Nov. 12	9.4
Booth	Piowaty	5	Nov. 12	Nov. 12	7.8
Booth 7	--	4	Nov. 12	Nov. 12	8.4
Booth 3	McBride	5	Nov. 12	Nov. 12	7.4
Blakeman	DeGuise	5	Nov. 17	Nov. 18	9.1

*Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8	9-15	14	--	9-27	12	--	--	--	--	10-10
Booth 7	10-15	16	--	11-1	--	--	--	--	--	11-1
Hickson	10-15	14	--	11-1	--	--	--	--	--	11-1
Blair	10-18	16	--	11-1	--	--	--	--	--	11-1
Lula	10-18	16	--	11-1	--	--	--	--	--	11-1
Blakeman	11-1	--	--	11-1	--	--	--	--	--	11-1
Hall	11-1	18	--	12-1	--	--	--	--	--	12-1
Taylor	11-1	12	--	11-15	--	--	--	--	--	11-15
Booth 1	11-15	16	--	12-1	--	--	--	--	--	12-1
Booth 3	11-5	14	--	12-1	--	--	--	--	--	12-1

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

[fol. 20]

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1955-56 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	--	5	Oct. 17, 1955	Oct. 17, 1955	6.9
Lula	Higgins	4	Oct. 17	Oct. 17	6.3
Lula	Higgins	4	Oct. 17	Oct. 17	5.7
Lula	--	5	Oct. 20	Oct. 20	7.8
Taylor	Heucr	7	Oct. 21	Oct. 21	6.9
Lula	2	5	Oct. 21	Oct. 24	8.8
Lula	1	5	Oct. 21	Oct. 24	9.2
Hickson	--	5	Nov. 9	Nov. 9	6.8
Lula	FLAG	5	Nov. 10	Nov. 10	7.2
Lula	Drew	5	Nov. 10	Nov. 10	9.8
Lula	McBride	4	--	Nov. 10	11.7
Hickson	--	5	Nov. 10	Nov. 10	7.4
Lula	--	5	Nov. 10	Nov. 10	5.8
Lula	1	5	--	Nov. 14	8.8
Lula	2	5	--	Nov. 14	8.0
Lula	3	5	--	Nov. 14	10.8
Lula	4	5	--	Nov. 14	7.1
Lula	5	5	--	Nov. 14	9.7
Lula	6	5	Nov. 14	Nov. 15	7.7
Lula	7	5	Nov. 14	Nov. 15	8.3
Booth 7	--	5	Nov. 14	Nov. 15	7.8
Lula	8	5	Nov. 14	Nov. 15	8.3
Lula	1	6	Nov. 18	Nov. 18	7.4
Lula	1	1	Nov. 18	Nov. 18	6.4
Lula	1	1	Nov. 18	Nov. 18	7.9
Lula	2	6	Nov. 18	Nov. 18	8.1
Lula	2	1	Nov. 18	Nov. 18	6.3
Lula	2	1	Nov. 18	Nov. 18	7.5
Blakeman	--	5	Nov. 18	Nov. 18	3.7
Lula	Curtis	5	Nov. 23	Nov. 23	10.0
Lula	Kip	5	Nov. 23	Nov. 23	9.3
Blakeman	DeGuise	5	Nov. 30	Nov. 30	4.4
Booth 7	-	10	Dec. 5	Dec. 5	7.2
Booth 7	--	1	Dec. 5	Dec. 5	7.2
Booth 7	--	5	Dec. 8	Dec. 8	7.2
Taylor	--	1	Jan. 3, 1956	Jan. 3, 1956	12.8
Taylor	--	8	Jan. 3	Jan. 3	11.0
Taylor	--	1	Jan. 3	Jan. 3	10.4

*Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-3	18	3 10/16	10-17	16	3 7/16	--	--	--	--
(	--	--	--	10-31	14	3 4/16	11-14	11	2 15/16	12-12
Booth 7	10-10	16	3 9/16	10-24	14	3 7/16	11-7	10	3 1/16	11-21
Hickson	10-17	14	3 4/16	10-31	10	2 15/16	11-14	8	2 12/16	12-5
Taylor	11-7	14	3 5/16	11-28	12	3 2/16	12-12	9	2 13/16	1-2

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

[fol. 21]

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1956-57 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	--	6	Oct. 29, 1956	Oct. 30, 1956	5.7
Lula	--	6	Nov. 12	Nov. 12	6.8
Lula	1	6	Nov. 14	Nov. 15	7.4
Lula	2	6	Nov. 14	Nov. 15	6.8
Lula	3	6	Nov. 14	Nov. 15	7.6
Lula	Higgins	5	Nov. 15	Nov. 15	7.4
Lula	6	6	Nov. 15	Nov. 15	6.8
Lula	5	6	Nov. 14	Nov. 16	5.8
Lula	4	6	Nov. 14	Nov. 16	8.6
Hall	--	2	Nov. 15	Nov. 16	6.4
Lula	1	6	Nov. 19	Nov. 20	7.2
Lula	2	6	Nov. 19	Nov. 20	8.6
Lula	3	6	Nov. 19	Nov. 20	6.6
Lula	4	6	Nov. 19	Nov. 20	6.8
Lula	1	6	Nov. 26	Nov. 26	6.1
Lula	2	7	Nov. 26	Nov. 26	7.6
Lula	3	7	Nov. 26	Nov. 26	7.5
Lula	4	7	Nov. 26	Nov. 26	7.6
Lula	5	6	Nov. 26	Nov. 26	7.4
Lula	1	6	Nov. 27	Nov. 27	6.8
Lula	2	7	Nov. 27	Nov. 27	7.9
Lula	1	6	Nov. 29	Nov. 29	6.9
Lula	2	6	Nov. 29	Nov. 29	7.2
Lula	3	6	Nov. 29	Nov. 29	8.0
Lula	4	6	Nov. 29	Nov. 29	7.3
Lula	1	6	Dec. 3	Dec. 3	8.0
Lula	2	6	Dec. 3	Dec. 3	7.8
Lula	3	6	Dec. 3	Dec. 3	6.8
Lula	4	6	Dec. 3	Dec. 3	8.7
Lula	1	6	Dec. 4	Dec. 4	9.1
Lula	2	6	Dec. 4	Dec. 4	8.5
Lula	3	6	Dec. 4	Dec. 4	8.5
Lula	4	6	Dec. 4	Dec. 4	6.7
Booth 1	Higgins	6	Dec. 4	Dec. 4	10.0
Booth 1	Higgins	7	Dec. 4	Dec. 4	9.3
Lula	Higgins	6	Dec. 4	Dec. 5	8.0
Lula	5	6	Dec. 4	Dec. 5	7.4
Lula	6	6	Dec. 5	Dec. 5	7.2
Lula	7	6	Dec. 5	Dec. 5	8.6
Lula	--	6	Dec. 6	Dec. 6	8.3
Taylor	Higgins	6	Dec. 10	Dec. 10	7.8
Taylor	Higgins	6	Dec. 10	Dec. 10	7.7

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-8	18	3 10/16	10-22	16	3 7/16	--	--	--	--
(	--	--	--	11-5	14	3 4/16	12-3	11	2 15/16	12-10
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1957-58 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	1	8	--	Oct. 8, 1957	5.6
Lula	2	6	--	Oct. 8	6.6
Lula	1	6	Oct. 28, 1957	Oct. 28	6.8
Lula	2	6	Oct. 28	Oct. 28	6.8
Lula	1	6	Nov. 6	Nov. 6	7.4
Lula	2	6	Nov. 6	Nov. 6	7.0
Lula	3	6	Nov. 6	Nov. 6	6.8
Lula	4	6	Nov. 6	Nov. 6	7.2
Lula	1	6	Nov. 12	Nov. 12	8.2
Lula	1	6	Nov. 12	Nov. 13	8.7
Lula	2	6	Nov. 12	Nov. 13	8.5
Lula	3	6	Nov. 12	Nov. 13	8.5
Booth 8	1	6	Nov. 13	Nov. 13	5.6
Booth 8	2	6	Nov. 13	Nov. 13	7.1
Booth 8	3	6	Nov. 13	Nov. 13	6.8
Booth 8	4	6	Nov. 13	Nov. 13	6.8
Lula	1	6	Nov. 12	Nov. 14	8.5
Lula	2	6	--	Nov. 14	6.6
Lula	3	6	--	Nov. 14	8.2
Lula	4	6	--	Nov. 14	8.9
Lula	5	6	--	Nov. 14	7.6
Lula	1	6	Nov. 25	Nov. 26	8.5
Lula	2	6	Nov. 25	Nov. 26	8.0
Lula	3	6	Nov. 25	Nov. 26	8.6

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8(	9-16	15	3 6/16	9-30	13	3 4/16	--	--	--	--
(	--	--	--	10-14	11	3 1/16	10-28	10	2 15/16	11-18
Lula(	10-7	18	3 10/16	10-21	16	3 7/16	--	--	--	--
(	--	--	--	11-4	14	3 4/16	11-18	11	2 15/16	12-9

[fol. 23]

Plaintiffs' Exhibit 13

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1954-55 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Hickson	Chandler	--	Oct. 14, 1954	Oct. 14, 1954	6.1
Hickson	--	--	Oct. 14	Oct. 14	6.7
Lula	Chandler	--	Oct. 13	Oct. 14	6.3
Lula	Chandler	--	Oct. 13	Oct. 14	5.2
Camp	Camp	--	Oct. 13	Oct. 14	7.3
Lula	English	5	Oct. 19	Oct. 21	7.2
Lula	Chandler	--	Oct. 20	Oct. 21	6.5
Hickson	Chandler	--	Oct. 20	Oct. 21	7.6
Hickson	Kendall	--	Oct. 20	Oct. 21	7.9
Lula	Lowa	5	Oct. 21	Oct. 21	5.7
Lula	McMillan	--	Oct. 20	Oct. 21	7.0
Camp	Camp	--	Oct. 20	Oct. 21	6.4
Lula	Chandler	--	Oct. 20	Oct. 21	6.3
Lula	Peters	--	Oct. 20	Oct. 21	7.3
Hickson	Kendall	5	Oct. 27	Oct. 27	8.4
Hickson	Chandler	5	Oct. 27	Oct. 27	9.6
Lula	5A	5	Oct. 27	Oct. 27	5.5
Lula	Harrison	5	Oct. 27	Oct. 27	6.9
Lula	Princeton	5	Oct. 27	Oct. 28	6.1
Lula	Jeron	5	Oct. 27	Oct. 28	7.7
Lula	Peters	5	Oct. 27	Oct. 28	7.8
Vaca	Krome	--	Oct. 28	Oct. 29	8.2
Lula	Krome	--	Oct. 29	Oct. 29	4.7
Lula	Krome	--	Oct. 29	Oct. 29	5.0
Lula	Krome	--	Oct. 29	Oct. 29	5.5
Lula	Krome	--	Oct. 29	Oct. 29	5.7
Lula	Futch	9	--	Nov. 2	6.3
Booth 7	Futch	8	--	Nov. 2	4.1
Lula	--	--	Nov. 1	Nov. 3	6.4
Lula	--	--	Nov. 1	Nov. 3	6.0
Booth 8	--	--	Nov. 1	Nov. 3	5.5
Booth 8	--	--	Nov. 1	Nov. 3	5.7
Lula	Harrison	5	Nov. 4	Nov. 4	6.6
Lula	Princeton	5	Nov. 4	Nov. 4	5.7
Lula	Peters	5	Nov. 4	Nov. 5	8.3
Lula	Chandler 5A	5	Nov. 4	Nov. 5	6.5
Lula	Jeron	5	Nov. 4	Nov. 5	7.8
Lula	McMillan	5	Nov. 4	Nov. 5	7.7
Booth 7	--	11	Nov. 8	Nov. 10	7.7
Booth 7	Futch				
Lula	Kinard	2	Nov. 10	Nov. 12	9.6
Camp	Camp	8	--	Nov. 17	9.2
Lula	McMillan	5	Nov. 17	Nov. 18	8.3
Lula	Kinard	10	Nov. 18	Nov. 18	9.6
Lula	Kinard	9	Nov. 18	Nov. 18	9.0
Lula	Kinard	5	Nov. 18	Nov. 18	8.8
Lula	Harrison	5	Nov. 17	Nov. 18	8.3
Lula	Ch 5A	5	Nov. 17	Nov. 18	6.7
Taylor	Ch 5A	5	Nov. 17	Nov. 18	8.8
Booth 7	Cox	6	Nov. 17	Nov. 18	9.5
Lula	Peters	5	Nov. 17	Nov. 18	8.8
Lula	Jeron	5	Nov. 17	Nov. 18	9.2
Booth 3		5	Nov. 17	Nov. 19	10.0

*Variet			Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8	9-15	14	--	9-27	12	--	--	--	--	10-10
Vaca	10-6	14	--	10-20	--	--	--	--	--	10-20
Booth 7	10-15	16	--	11-1	--	--	--	--	--	11-1
Hickson	10-15	14	--	11-1	--	--	--	--	--	11-1
Lula	10-18	16	--	11-1	--	--	--	--	--	11-1
Taylor	11-1	12	--	11-15	--	--	--	--	--	11-15
Booth 3	11-5	14	--	12-1	--	--	--	--	--	12-1

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1955-56 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Booth 3	Camp	6	Nov. 19, 1955	Nov. 19, 1955	6.9
Booth 3	Camp	6	Nov. 14	Nov. 19	8.0
Lula	Camp	6	Nov. 23	Nov. 23	8.0
Booth 3	Camp	6	Nov. 23	Nov. 23	6.2

*Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-3	18	3 10/16	10-17	16	3 7/16	--	--	--	--
(	--	--	--	10-31	14	3 4/16	11-14	11	2 15/16	12-12
Booth 3	10-31	16	3 10/16	11-14	14	3 8/16	11-28	10	3 1/16	12-12

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

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UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1956-57 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	Sagehorn	6	Nov. 9, 1956	Nov. 13, 1956	8.3
Vaca	Krome	10	Nov. 12	Nov. 13	7.1
Booth 7	Krome	10	Nov. 12	Nov. 13	4.4
Lula	1	6	Nov. 19	Nov. 21	7.4
Lula	--	6	Nov. 21	Nov. 21	6.1
Lula	--	6	Nov. 21	Nov. 21	6.4
Lula	McMillan	6	Nov. 19	Nov. 21	7.6
Lula	Serlecte	6	Nov. 19	Nov. 21	8.6
Lula	Warwick	6	Nov. 20	Nov. 21	8.8
Lula	J-F	6	Nov. 20	Nov. 23	7.4
Lula	Sagehorn	6	Nov. 21	Nov. 23	7.7
Lula	Melfield	6	Nov. 26	Nov. 26	8.0
Lula	J-F	6	Nov. 27	Nov. 28	9.8
Booth 1	J-F	6	Nov. 27	Nov. 28	9.9
Booth 1	Rivers	6	Nov. 28	Nov. 28	8.4
Booth 3	--	6	Nov. 28	Nov. 28	9.2
Booth 1	Camp	6	Nov. 28	Nov. 28	9.4
Lula	Camp	6	Nov. 28	Nov. 28	5.8
Taylor	Camp	6	Nov. 28	Nov. 28	8.2
Booth 3	Barnum	6	Dec. 4	Dec. 4	7.6
Lula	6	6	Dec. 5	Dec. 5	9.0
Lula	5	6	Dec. 5	Dec. 5	9.2
Booth 7	7	6	Dec. 5	Dec. 5	5.1
Booth 7	8	6	Dec. 5	Dec. 5	7.1
Booth 7	9	6	Dec. 5	Dec. 5	5.0
Lula	1	6	Dec. 5	Dec. 5	7.8
Lula	2	6	Dec. 5	Dec. 5	6.7
Lula	3	6	Dec. 5	Dec. 5	9.2
Lula	4	6	Dec. 5	Dec. 5	8.6
Vaca	Krome	6	Dec. 5	Dec. 6	11.5
Lula	1	6	Dec. 5	Dec. 6	11.2
Lula	3	6	Dec. 5	Dec. 6	7.6
Booth 6	6	6	Dec. 6	Dec. 6	6.0
Booth 3	5	6	Dec. 6	Dec. 6	8.8
Booth 1	7	6	Dec. 6	Dec. 6	9.7
Lula	7	6	Dec. 6	Dec. 7	7.6
Lula	6	6	Dec. 6	Dec. 7	6.7
Taylor	5	6	Dec. 7	Dec. 7	9.0
Hickson	3	6	Dec. 7	Dec. 7	7.8
Booth 3	2	6	Dec. 7	Dec. 7	7.2
Lula	2	6	Dec. 7	Dec. 7	7.2
Booth 1	4	6	Dec. 7	Dec. 7	7.4
Lula	9	6	Dec. 7	Dec. 7	8.8
Lula	8	6	Dec. 7	Dec. 7	7.7
Lula	10	6	Dec. 7	Dec. 7	7.8
Lula	Camp	6	Dec. 10	Dec. 10	7.9
Booth 7B	--	6	Dec. 13	Dec. 14	9.6
Booth 3	--	6	Dec. 13	Dec. 14	10.2
Collinson	--	6	Dec. 14	Dec. 14	8.4
Herman	--	6	Dec. 14	Dec. 14	8.1
Collinson	PH	6	Dec. 14	Dec. 14	7.6
Lula	Camp	6	Dec. 17	Dec. 17	6.8
Lula	Camp	6	Dec. 17	Dec. 18	6.6

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula	10-8	18	3 10/16	10-22	16	3 7/16	--	--	--	-
(	--	--	--	11-5	14	3 4/16	12-3	11	2 15/16	12-10
Booth 7	10-15	16	3 10/16	10-29	14	3 8/16	11-12	10	3 2/16	12-3
Vaca	10-15	16	3 9/16	10-29	14	3 7/16	11-12	10	3 0/16	12-3
Hickson	10-22	14	3 4/16	11-5	11	3 0/16	11-19	9	2 13/16	12-10
Collinson	10-22	16	3 11/16	11-5	14	3 8/16	11-19	10	3 1/16	12-10
Herman	11-5	16	3 9/16	11-19	14	3 7/16	12-3	10	3 1/16	12-24
Booth 7B	11-12	18	3 12/16	11-26	15	3 9/16	12-10	11	3 3/16	12-31
Boo 3	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Tayl	11-19	16	3 9/16	12-3	14	3 7/16	12-17	10	3 1/16	1-7
	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1957-58 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested
Lula	1	6	Oct. 31, 1957	Nov. 1, 1957
Lula	2	6	Oct. 31	Nov. 1
Lula	3	6	Oct. 31	Nov. 1
Lula	1	6	Nov. 4	Nov. 4
Lula	2	6	Nov. 4	Nov. 4
Lula	3	6	Nov. 4	Nov. 4
Lula	3	6	Nov. 5	Nov. 5
Lula	2	6	Nov. 5	Nov. 5
Lula	1	6	Nov. 5	Nov. 5
Lula	1	6	Nov. 6	Nov. 6
Lula	2	6	Nov. 6	Nov. 6
Lula	3	6	Nov. 6	Nov. 6
Lula	1	6	Nov. 7	Nov. 8
Lula	2	6	Nov. 7	Nov. 8
Lula	3	6	Nov. 7	Nov. 8
Lula	4	6	Nov. 7	Nov. 8
Lula	5	6	Nov. 7	Nov. 8
Lula	6	6	Nov. 7	Nov. 8
Booth 7	1	6	Nov. 12	Nov. 12
Lula	2	6	Nov. 12	Nov. 12
Lula	3	6	Nov. 12	Nov. 12
Lula	4	6	Nov. 12	Nov. 12
Lula	5	6	Nov. 12	Nov. 12
Booth 3	6	6	Nov. 12	Nov. 12
Booth 8	--	6	--	Nov. 18
Booth 8	--	6	--	Nov. 18
Booth 8	--	6	--	Nov. 18

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date
Booth 8	9-16	15	3 6/16	9-30	13	3 4/16	--	--	--	--
(	--	--	--	10-14	11	3 1/16	10-28	10	2 15/16	11-
Lula	10-7	18	3 10/16	10-21	16	3 7/16	--	--	--	--
(	--	--	--	11-4	14	3 4/16	11-18	11	2 15/16	12-
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-

[fol. 27]

PLAINTIFFS' EXHIBIT 14

AVOCADO SHIPPING DATES

1956-57 Season

Variety	Date A	Min Wt	Min Dia	Date B	Min Wt	Min Dia	Date C	Min Wt	Min Dia	Date D
Fuchs	6-18	12	3 1/16	7-2	10	2 13/16	7-16	8	2 9/16	8-6
Pollock	7-2	18	3 10/16	7-16	15	3 6/16	7-30	12	3 1/16	8-27
Simmonds	7-2	16	3 9/16	7-16	14	3 7/16	7-30	12	3 4/16	8-27
Nadir	7-2	14	3 5/16	7-16	12	3 2/16	7-30	9	2 12/16	8-27
Hardee	7-2	16	3 5/16	7-16	14	3 2/16	7-30	10	2 12/16	8-27
Trapp	7-23	14	3 9/16	8-6	12	3 7/16	8-20	10	3 3/16	9-17
Waldin	7-30	16	3 9/16	8-13	14	3 6/16	8-27	10	3 1/16	10-15
Peterson	8-6	12	3 6/16	8-20	10	3 2/16	9-3	8	2 14/16	9-24
Pinelli	8-20	18	--	8-27	16	--	9-3	12	--	9-24
Tonnage	8-20	14	--	8-27	12	--	9-3	10	--	9-24
Fairchild	8-20	16	3 10/16	9-3	14	3 7/16	9-17	10	3 0/16	10-1
(Booth 8	9-17	15	3 6/16	9-26	13	3 4/16	10-15	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	11-5	9	2 14/16	11-26
Hirody	9-17	18	3 15/16	10-1	15	3 11/16	10-15	10	3 3/16	11-5
Simpson	10-1	16	--	10-15	14	--	10-29	10	--	11-19
(Lula	10-8	18	3 10/16	10-22	16	3 7/16	11-5	14	3 4/16	--
(Lula	--	--	--	--	--	--	[redacted]	11	2 15/16	12-10
Rue	10-8	30	4 3/16	10-15	24	3 15/16	10-29	18	3 9/16	11-12
Black Prince	10-8	16	--	10-22	14	--	11-5	10	--	11-26
Booth 7	10-15	16	3 10/16	10-29	14	3 8/16	11-12	10	3 2/16	12-3
Sherman	10-15	16	--	10-29	14	--	11-12	10	--	12-3
Vaca	10-15	16	3 9/16	10-29	14	3 7/16	11-12	10	3 0/16	12-3
Marcus	10-15	32	--	--	--	--	--	--	--	11-26
Hickson	10-22	14	3 4/16	11-5	11	3 0/16	11-19	9	2 13/16	12-10
Collinson	10-22	16	3 11/16	11-5	14	3 8/16	11-19	10	3 1/16	12-10
Avon	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-10
Booth 5	10-22	16	3 11/16	11-5	14	3 9/16	11-19	9	3 1/16	12-10
Blair	10-22	16	--	11-5	14	--	11-19	9	--	12-10
Nelson	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-10
Monroe	10-29	24	--	11-26	20	--	12-17	14	--	1-7
Hall	11-5	20	3 9/16	11-19	16	3 5/16	12-3	14	3 3/16	12-24
Herman	11-5	16	3 9/16	11-19	14	3 7/16	12-3	10	3 1/16	12-24
Winslowson	11-5	18	3 14/16	11-19	16	3 12/16	12-3	10	3 2/16	12-24
Booth 10	11-5	16	--	11-19	14	--	12-3	9	--	12-24
Booth 11	11-5	16	--	11-19	14	--	12-3	9	--	12-24
Ajax(Booth 78)	11-12	18	3 12/16	11-26	15	3 9/16	12-10	11	3 3/16	12-31
Booth 3	11-19	16	3 9/16	12-3	14	3 7/16	12-17	10	3 1/16	1-7
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7
Dunedin	11-19	16	3 10/16	12-3	14	3 8/16	12-17	9	2 15/16	1-7
Choquette	11-26	24	--	12-10	18	--	12-[redacted]	14	--	1-14
Linda	12-10	18	--	12-24	15	--	1-7	12	--	1-21
Byars-1	12-10	16	--	12-24	14	--	1-7	9	--	1-28
Nabal	12-10	14	3 8/16	12-24	12	3 5/16	1-7	8	2 14/16	1-28
Wagner	12-17	12	3 5/16	12-31	10	3 2/16	1-14	8	2 14/16	2-4
Schmidt	1-28	16	--	2-11	14	--	--	--	--	2-25
Itsamna	2-25	--	--	--	--	--	--	--	--	3-25

Date "A" No fruit may be shipped before this date.
Date "D" No restrictions on size or weight after this date.
Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
All weights in ounces, diameters in inches.

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations:

West Indian Type: None before June 1.
June 1 to June 18, none smaller than 16 oz.
June 18 to July 16, none smaller than 14 oz.
July 16 to Sept. 10, none smaller than 12 oz.
After Sept. 10, no restrictions.

Guatemalan Type and Guatemalan x W. Indian Hybrids: None before Sept. 3.
Sept. 3 to Oct. 1, none smaller than 14 oz.
Oct. 1 to Dec. 17, none smaller than 12 oz.
After Dec. 17, no restrictions.

Exceptions applicable to seedlings and unlisted varieties: Avocados which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

This schedule voids and supersedes the schedules shown on AAC-234 and AAC-247.

AAC-267

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PLAINTIFFS' EXHIBIT 16
OIL TESTS FOR 1953

July 6, 1953

Pollock R I T 3
all refractive indices at 30°C.
R.I. of oil = 1.6325, 1.6327

Wt.		Date	R. I.	% oil		
666g.	1	7-6	1.6290	2.2%	7-6	average 7-6 = 2.2
652g.	2	7-6	1.6290	2.2	"	
547g.	3	7-6	1.6285	2.5	"	
611	4	7-6	1.6290	2.2	7-6	
594	5	7-8b	1.6284	2.6	7-8	
454	6	7-8b	1.6288	2.3	"	
558	7	7-8b	1.6280	2.8	"	
546	8	7-8b	1.6283	2.6	"	
529	9	7-8b	1.6277	2.9	"	
512	10	7-8b	1.6278	2.9	"	
818	11	7-6	1.6281	2.7	7-6	average 7-6 = 2.3
257	12	7-6	1.6290	2.2	"	
201	13	7-6	1.6294	2.0	"	
320	14	7-6	1.6290	2.2	"	
890	15	7-6	1.6290	2.2	"	
815	16	7-6	1.6278	2.9	"	
355	17	7-6	1.6290	2.2	"	
352	18	7-6	1.6290	2.2	"	
265	19	7-8b	1.6291	2.2	7-8	
407	20	7-8b	1.6292	2.1	"	
296	21	7-8	1.6259	4.0%	7-8	average 7-8 = 3.9
137	22	7-8	1.6275	3.0	"	
252	23	7-8	1.6249	4.6	"	
204	24	7-8	1.6259	4.0	"	
273	25	7-8	1.6255	4.2	"	
255	26	7-8	1.6261	3.8	"	
262	27	7-8	1.6255	4.2	"	
164	28	7-8	1.6269	3.4	"	
240	29	7-8	1.6262	3.8	"	
206	30	7-8	1.6259	4.0	"	

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R.I. oil 1.6325-1.6328 July 13, 1953
Pollock
R.I. at 30° C

Vial		Date	R.I.	% oil	
617	1	7-13	1.6293	2.1	7-13
611	2		1.6292	2.1	"
608	3		1.6284	2.6	"
675	4		1.6291	2.2	"
606	5		1.6284	2.6	"
651	6		1.6293	1.8	"
565	7		1.6291	2.2	"
580	8		1.6287	2.4	"
575	9		1.6278	2.9	"
581	10		1.6288	2.3	"
354	11		1.6295	2.0	"
301	12		1.6299	1.8	"
376	13		1.6283	2.6	"
284	14		1.6288	2.3	"
383	15		1.6294	2.0	"
405	16		1.6295	2.0	"
287	17		1.6293	2.1	"
226	18		1.6301	1.6	"
377	19		1.6291	2.2	"
229	20		1.6306		"

average % = 2.3
ave. diff. = 607

average % = 2.1
ave. diff. = 522

etc

Diacetone Searching

371	1	7-15	1.6258	% 7-15	
337	2		1.6253	4.3	"
444	3		1.6259	4.0	"
432	4		1.6251	4.4	"
351	5		1.6258	4.0	"
398	6		1.6259	4.0	"
358	7		1.6251	4.4	"
352	8		1.6264	3.6	"
324	9		1.6260	3.9	"
376	10		1.6243	4.9	"
218	11		1.6270	3.3	"
199	12		1.6255	4.2	"
171	13		1.6278	3.3	"

average % = 4.2
ave. diff. = 374

Wt.		Date	R.I.	% oil	
211	14		1.6275	3.0	% 3.6
195	15		1.6273	3.2	
253	16		1.6263	3.7	
218	17		1.6263	3.7	
187	18		1.6260	3.9	
162	19		1.6265	3.6	
159	20		1.6265	3.6	
204	1	7-17	1.6274	3.1	7-17
231	2		1.6271	3.3	7-21
239	3		1.6277	2.9	
153	4		1.6273	3.2	
201	5		1.6275	3.0	
233	6		1.6272	3.2	
253	7		1.6275	3.0	
288	8		1.6285	2.5	
248	9		1.6260	3.9	
247	10		1.6282	2.7	
319	11		1.6266	3.5	
298	12		1.6275	3.0	3.2
329	13		1.6264	3.6	
379	14		1.6280	2.8	
269	15		1.6271	3.3	
255	16		1.6275	3.0	
315	17		1.6266	3.5	
285	18		1.6272	3.2	
260	19		1.6278	2.9	
269	20		1.6267	3.5	
			Pollock		7-20.
571	1	7-27	1.6284	2.6	
557	2		1.6287	2.4	
569	3		1.6271	3.3	
519	4		1.6282	2.7	
567	5		1.6276	3.0	
550	6		1.6284	2.6	
561	7		1.6283	2.6	
487	8		1.6271	3.3	
563	9		1.6285	2.5	

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wt.		Date	R.I.	% oil	
554	10	7-20	1.6281	2.7	%
278	11		1.6289	2.3	
327	12		1.6290	2.2	
319	13		1.6289	2.3	average % .24
391	14		66 272	3.2	ave. wt. 295
302	15		1.6291	2.2	
310	16		1.6288	2.3	
301	17		1.6284	2.6	
260	18		1.6287	2.4	
241	19		1.6292	2.1	
218	20		1.6288	2.3	
					7-27-53
601	1	7-27	1.6293	1.8	Pollock
517	2		1.6294	2.0	
534	3		1.6295	2.0	ave. % .20
501	4		1.6294	2.0	ave. wt. 514
507	5		1.6293	2.1	
472	6		1.6294	2.0	
530	7		1.6299	1.8	
596	8		1.6292	2.1	
459	9		1.6287	2.4	
424	10		1.6296	1.9	
372	11		1.6283	2.6	Walden
350	12		1.6285	2.5	
355	13		1.6275	3.0	
299	14		1.6281	2.7	average % .26
374	15		1.6281	2.7	ave. wt. 358
345	16		1.6284	2.6	
340	17		1.6289	2.3	
329	18		1.6277	2.9	
407	19		1.6293	2.1	
277	20		1.6281	2.7	

Weight		Date	A.cl. W. Rhenery	Pool drove	Walden
185	1	7-30	1.6278	2.9	
198	2		1.6273	3.2	
187	3		1.6275	3.0	
195	4		1.6278	3.3	average 3.32
256	5		1.6286	2.1	ave. wt. = 231
254	6		1.6269	3.4	
212	7		1.6270	3.3	
303	L 8		1.6261	3.8	
262	9		1.6262	3.8	
316	10		1.6271	3.3	
411	11		1.6271	3.3	
413	12		1.6264	3.6	
443	13		1.6270	3.3	
454	14		1.6269	3.4	average 3.35
415	15		1.6268	3.4	ave. wt. = 391
382	16		1.6267	3.5	
361	17		1.6270	3.3	
391	18		1.6267	3.5	
400	19		1.6258	4.0	
285	S 20		1.6275	3.0	

2,573 — 8-3 — 1.6283 — 2.6 — Kendal (Walden)

4,420 — 1.6275 — 3.0

Weight		Date 8-3	Rd.	Tol	
					(Waldein)
4,118	1.	8-3	1.6272	3.2	Brooks
2,937	2		1.6273	3.2	
3,202	1.		1.6283	2.6	Pollock
6,504	2.		1.6271	3.3	(Block 5)
					8-12
3,007	1.	8-12	1.6272	3.2	Booth 8 Blk 5
2,992	1.	8-12	1.6282	2.7	Jula Blk 5
			1.6276		
9,059	1.	8-12		3.0	Pollocks
5,080	2.		1.6287.	2.4	
2,920	1	8-12	1.6274	3.1	Waldein
4,379	2.		1.6274	3.1	(Kendall N Texas)
4,625	1.	8-12	1.6263	3.7	Waldein
2,865	2.		1.6260.	3.9	(Rehmig N Tex)
4,023	1.	8-12	1.6252	4.4	Waldein
2,840	2		1.6252	4.4	(Brooks N Texas)
					8-18
4,446	1.	8-18	1.6240	5.1	Waldein
3,260	2.		1.6245	4.8	(Brooks)

Weight		Date		Rdr.	% ash	
3,831	1.	8-18	3.1	1.6276	3.0	Lula
2,321	2.		3.0	1.6289	2.3	(Kendall
4,746	1.			1.6275	3.0	Booth
3,400	2.			1.6262	3.8	(Kendall
2,700	1.		4.1	1.6267	3.5	Lula
3,871	2.		3.5	1.6268	3.4	(Brook
4,144	1.			1.6274	3.1	Wallace
5,130	2.			1.6278	2.9	(Kendall
2,077	1.			1.6270	3.3	Booth
3,188	2.			1.6267	3.5	(Brook
2,032	1.	8-25		1.6269	3.4	Booth
3,174	2.			1.6265	3.6	(Kendall
3,737	1.			1.6240	5.1	Wallace
4,855	2.			1.6243	4.9	(Brook
3,220	1.		4.3	1.6258	4.0	Lula
4,074	2		4.6	1.6248	4.6	(Brook
4,782	1.			1.6252	4.4 8-26	Wallace
3,302	2.			1.6258	4.0	(Brook
3,589	1.		3.1	1.6243	4.9	Lula
2,599	2		4.2	1.6254	4.2	(Flag
3,419	1.			1.6261	3.8	Booth
2,530	2.			1.6270	3.3	(Brook
3,603	1			1.6265	3.6	Booth
2,459	2.			1.6282	2.7	(Flag

Weight		Date Tested	Test	Gravity	Date Sampled	Remarks
5,206	1.	8-25	1.6267	3.5	8-26	Walden
4,000	2.		1.6261	3.8		(Kendall)
3,900	1.	4.1	1.6259	4.0		Tula
2,711	2.	4.4	1.6262	3.8		(Kendall)
3,359	1.	8-26	1.6261	3.8	8-26	Booth B
2,253	2.		1.6262	3.8		Blk 5 R20T1
4,374	1.	4.1	1.6253	4.3		Tula
3,145	2.	3.6	1.6272	3.2		Blk 5 R16T2
3827	1.	4.2	1.6257	4.1		Tula
3,008	2.	4.1	1.6265	3.6		Blk 9 R5 T3
4,495	1.		1.6256	4.1		Booth B
2614	2.		1.6271	3.3		Blk 5 R21 T1
5,251	1.	9-1 4"	1.6233	5.5	9-1	Tula
3,305	2.	5.1	1.6245	4.8		Blk. 9 R2T3
4,114	1.		1.6246	4.7		Booth B
2,960	2		1.6263	3.7		Blk 5 R21T1
5,201	1		1.6225	6.0		Tula Blk 9 R5 T6
4658	1.	4 3	1.6248	4.6		
3538	2	3 8	1.6259	4.0		Tula Blk 5 R16T1
3,480	1.		1.6263	3.7		
2,380	2.		1.6260	3.9		Booth B Blk 5 R20T1
4,047	1.	4 2	1,6253	4.3		Tula
3,002	2.	3.7	1.6272	3.2		Kendall

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Weight		Date	Rel.	Coal		
3,625	1.	9-1	1.6245	4.9		Booth 8 (Kendall)
2729	2.		1.6265	3.6		
3,351	1.		1.6260	3.9		Booth (Brooks)
2,736	2.		1.6267	3.5		
3405	1.	5.5	1.6288	5.3	7-2	Lula (Flag)
2972	2.	4.6	1.6257	4.1		
3,624	1.		1.6262	3.8		Booth (Flag)
2552	2.		1.6276	3.0		
4964	1.		1.6263	3.7		Wilde (Kendall)
3451	2.		1.6275	3.0		
5,063	1.		1.6262	3.8		Elder (Brooks)
4,309	2.		1.6261	3.8		
3,744	1.		1.6241	5.1		(Prescott)
3,081	2.		1.6242	5.0		Lula
3,280	1.		1.6252	4.4		(Prescott)
2,255	2.		1.6270	3.3		Booth
4,146	1.	5.0	1.6241	5.1		Lula
3,211	2.	4.5	1.6256	4.1		(Brooks)
440	1.	91	1.6210	6.9	9-4	Lula
414	2.		1.6216	6.6		Blk 9
490	3.		1.6221	6.3		R 5 T 6
573	4.	ave. wt.	1.6195	7.9		
480	5.	485	1.6235	5.4		ave % = 6.4
537	6.		1.6239	5.2		"
572	7.		1.6222	6.2		
426	8.		1.6214	6.7		
450	9.		1.6218	6.4		
473	10.		1.6224	6.1		
				6.7		

Weight		Date	Rd	90 rd		
4459	1	9-8 4.3	1.6251	4.4	9-8	Lula
2973	2	3.7	1.6270	3.3		Kendale
4129	1	4.9	1.6243	4.9		Lula
3411	2	5.0	1.6246	4.7		Brooks
4450	1		1.6260	3.9		Walden
						Kendall
4723	1		1.6243	4.9		Walden
						Brooks
	2273 1.					
	3078 2.		1.6258	4.0		Booth 8
			1.6247	4.7		Flag
3017	1		1.6250	4.5	9-9	Booth 8
1975	2		1.6270	3.3		Kendall
3792	1	5.1	1.6229	5.8		Lula
3067	2	3.3	1.6244	4.9		Flag
3739	1		1.6249	4.6		Booth 8
2311	2		1.6259	4.0		Brooks
4156	1		1.6255	4.2		Lula
	→					Hasty ?
501	1	9-9	1.6224	6.1	9-7	Lula
495	2		1.6248	4.6		R2 T3 Bldg
438	3		1.6245	4.8		
481	4	2	1.6209	7.0		
455	5		1.6234	6.5		
456	6		1.6240	5.1		
516	7		1.6241	4.7		
518	8		1.6210	6.9		
502	9		1.6231	5.1		
535	10		1.6228	5.8		
4497				5.62		

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Weight		Date	R. cl.	Tail	
	1	9-9			9-9 $R_2 T_3$ Bl 9 Lake
397	2				
399	3				
514	4				
331	5		1.6235	5.4	
418	6				
467	7				
376	8				
309	9				
492	10				
4183					
4116	1.	9-9	1.6269	3.4	9-9 $R_{15} T_1$ Butch
4816	1.	3.6	1.6254	4.2.	$R_{16} T_1$ Bl 8 Lake
3432	1.		1.6265	3.6	$R_{20} T_1$ Butch
5182	2.		1.6259	4.0	
5723	1		1.6252	4.4	Waldin
3965	2		1.6249	4.6	Rahway

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Sept. 15

Weight		Date	R. I.	% Oil	
5155	1	9-15	1.6233	5.5	Booth 7
3227	2	"	1.6248	4.6	Bl. 9 R 4 T 2
3639	1	"	1.6239	5.2	Booth 8 R 20 T 1
2624	2		1.6250	4.5	
4170	1	"	1.6271	3.2	Booth 7
2763	2		1.6262	3.7	R 15 T 1
5527	1	4.6	1.6236	5.3	Lula R 16 T 1
3837	2	4.5	1.6251	4.4	
3050		9-16	1.6239	5.2	Sept. 17 Booth 8 Kendall
4310		4.6	1.6241	5.1	Lula Brooks
3514		4.2	1.6259	4.0	Lula Kendall
2693		"	1.6253	4.3	Booth 8 Brooks
4469	1	(Sept. 15) "	1.6288	2.3	Lula
3806	2	"	1.6287	2.4	Block 9 R 5 T 3
3074	1	9-16	1.6279	2.8	Booth 8 Higgins
2282	2	"	1.6280	2.8	
3566		"	1.6273	3.2	Trappe White
4163		"	1.6247	4.7	Pindle Whitgrove
5275	9-15	"	1.6224	6.1	Waldie Rheney

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Weight	Date	R.I.	% Ol	
335	9-16	1.6224	6.1	Sept 19 Lake Bluff
357	"	1.6241	5.1	glass
313	"	1.6200	7.6	
404	"	1.6230	5.7	"
385	"	1.6219	6.4	"
436	"	1.6234	5.5	"
316	"	1.6238	5.3	"
403	"	1.6233	5.5	"
332	"	1.6234	5.5	"
391	"	1.6223	6.1	"
291	"	1.6251	4.4	"
3963			5.74	
5382	9-21	1.6224	6.1	Sept 22 Lake Waggoner
4858	1 9-22 3/4	1.6229	5.8	Lake Bluff
3997	2 " 3.5	1.6234	5.5	
5902	"	1.6256	4.1	Walden Creek
5668	"	1.6223	6.1	Walden Creek
4349	1 9-22 3/5	1.6231	5.7	Sept 23 Lake Bluff
3155	2 " 3.1	1.6247	4.7	
3141	1 "	1.6245	4.8	South Bluff
1901	2	1.6247	4.7	
4829	1 "	1.6239	5.2	South Bank
2480	2	1.6252	4.4	
3542	1	1.6227	5.9	South Knob
2208	2	1.6242	5.0	
4621	1 " 4.3	1.6240	5.1	Lake Knoll
3397	2 3.1	1.6245	4.8	

Weight		Date	R. I.	% bkl	Sept 24
499		9.24	1.6284	5.5	Lula R16 T1
525	2		1.6240	5.1	
536	3		1.6223	6.1	
524	4		1.6241	5.1	
474	5		1.6233	5.5	
514	6		1.6259	4.0	
482	7		1.6242	5.0	
539	8		1.6243	4.9	
566	9		1.6230	5.7	
539	10		1.6233	5.5	
428	11		1.6251	4.4	
458	12		1.6247	4.7	
					Sept. 25
470	13		1.6219	6.4	Lula R16 T1
405	14		1.6249	4.6	
418	15		1.6239	5.2	
442	16		1.6247	4.7	
398	17		1.6233	5.5	
414	18		1.6259	3.6	
345	19		1.6242	5.0	
481	20		1.6239	5.2	
420		9.24	.6243	4.9	Lula McLeod grove
418			.6237	5.2	
399			.6226	6.0	
378			.6255	4.2	
514	0	9.24	.6213	6.8	Lula, R16 T1
414	18		1.6252	4.4	
					Sept. 26
561	a	9.26	1.6228	5.8	Lula R3 T3
	b		1.6229	5.8	Block 9
550	a		1.6233	5.5	
	b		1.6233	5.6	
419	a		1.6247	4.7	
	b		1.6244	5.1	
	c		1.6244	4.9	

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Weight		Date	R.J	% Oil	
					Sept 26
433		9-26	1.6240	5.1	Lula R_3 T_3
551		"	1.6281	5.7	Blank 9
					Sept 28
553	1	9-28	1.6238	6.3	83316 Quad 7 R_3 T_2
539	2	"	1.6243	4.9	84752
601	3		1.6228	5.8	81.305 % moisture
532	4		1.6257	4.1	84821 loss on 10g
473	5		1.6248	4.6	85.221 on sample dryed
446	6		1.6246	4.7	83816 at 75°C
460	7		1.6229	5.8	82.017
457	8		1.6221	6.3	81.954
497	9	9-28	1.6237	5.2	83305 Sept 29
398	10	"	1.6265	3.6	84870 Quad 7 R_3 T_2
6					
4299	1	9-29	1.6223	6.1	Hickson Rhey
2871	2	"	1.6229	5.8	
5464	1	"	1.6233	5.5	Booth 7 Rhey
3681	2		1.6240	5.1	
6168	1		1.6239	5.2	Hall Rhey
4120	2		1.6240	5.1	
					Sept 30
3932	1	9-29	1.6238	5.5	Lula Hay
2895		"	1.6234	5.5	
5270	1	"	1.6229	5.8	Booth 7
4330	2		1.6235	5.4	Kendall
3718	1	"	1.6220	6.2	Hickson
2036	2		1.6224	6.1	Kendall
6371	1	"	1.6239	5.2	Hall Hay
4634	2	"	1.6235	5.4	

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Weight		Date		RD	% Oil	Lot 30
3599	1	9-29		1.6244	49	Bred 8
2932	2			1.6247	47	Durkee
						October 1
4957	1	9-29	1.5	1.6211	69	Lula - Durkee
4015	2		1.4	1.6219	64	
3095	1			1.6230	57	Bred 8 Hog
1867	2			1.6239	52	
2442	1			1.6253	43	~~Hutton~~ Hog
2786	2			1.6251	44	Herman
3780	1			1.6227	59	Bred 8, Kendall
2699	2			1.6238	52	
						October 2
4982	1	9-29	4.6	1.6242	50	Lula - Kendall
3512	2		3.1	1.6244	49	
						October 5
672		10-5		1.6258	40	Seedling, Oxley
2508	1	10-5		1.6223	61	Lula - Higgins
2675	2			1.6210	69	
2158		10-5		1.6219	65	Lula - Biggers
513	1	10-5		1.6215	67	Lula - R16 T1
575	2			1.6229	58	
606	3			1.6211	69	
517	4			1.6244	49	% moisture
651	5			1.6224	61	loss on 10g
489	6			1.6220	63	sample drying
530	7			1.6225	60	at 75°C
477	8			1.6232	56	
496	9			1.6223	61	Lot 6
468	10			1.6204	73	
					61.7	

Weight	Date		R. D.	% Oil	October 6, 1911
5859	10-6		1.6212	6.8	Booth 3 Klang
5550	1		1.6222	6.1	Booth 7 Klang
4069	2		1.6226	6.0	
6491			1.6217	6.5	Walden Bunk
3165	1		1.6228	5.8	Booth 8 Hay
2391	2		1.6229	5.8	
3878	1		1.6227	5.9	Lula Hay
3117	2	6.4	1.6225	6.0	
					October 7
3944	1	10-6	1.6242	5.0	Booth 8
2872	2		1.6249	4.6	Brooks
4534	1		1.6244	4.9	Booth 3 Hay
3662	2		1.6258	4.0	
5502	1		1.6226	6.0	Booth 7
4240	2		1.6218	6.4	Kendall
4724	1	5.8	1.6236	5.4	Lula Kendall
3687	2		1.6239	5.2	
5185	1	5.7	1.6222	6.2	Lula Brooks
4131	2	6.1	1.6224	6.1	
3793	1		1.6235	5.4	Booth 8 Hay
2333	2		1.6237	5.3	
					October 12
2693	1	10-12	1.6221	6.3	Lula CA Sanders
859		10-12	1.6267	3.5	Daley Seeding

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Weight		Date	R. I.	% Oil	October 12
504	1.	10-12	1.6217	6.5	Lula, Block 9
589	2.	"	1.6224	6.1	R 2 T 3
					October 13
517	3	10-12	1.6210	6.9	Lula, Block 9
481	4.	"	1.6207	7.1	R. T 3
472	5		1.6208	7.1	
546	6		1.6207	7.1	
486	7		1.6208	7.1	
518	8.		1.6205	7.2	
542	9		1.6206	7.2	
567	10		1.6189	8.2	
5172					
5193	1	10-12	5.8 1.6231	6.3	Lula, Brooks
2891	2.		5.6 1.6240	5.1	
5640	1		1.6237	5.3	Hall, Kleney
4265	2.		1.6240	5.1	
					October 14
4565	1	10-13	1.6202	7.4	Hickson, Kleney
3661	2.		1.6207	7.1	
3117	1	"	1.6235	5.4	Booth & Kley
2775	2		1.6219	6.4	
3582	1.		1.6243	4.9	Booth & Brooks
2743	2		1.6243	4.9	
5018	1		1.6217	6.6	Booth 7
4504	2		1.6232	5.6	Kendall
3852	1		1.6220	6.3	Booth 8
3882	2		1.6244	4.9	Kendall
5165	1.		1.6210	6.9	Booth 7
4355	2.		1.6223	6.1	Kleney

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Weight		Date		RI	% Oil		
5888	1	10-13	7.5	1.6225	6.0		Lola, Knauf
3918	2		7.6	1.6232	5.6		
4968	1			1.6213	6.8		Erickson
3068	2			1.6220	6.2		Kendall
5536	1		7.4	1.6192	8.1		Lola, Hay
3755	2		6.6	1.6215	6.7		
6493				1.6231	5.7		Hall Hay
3632				1.6238	5.2		~~Erickson Hay~~ Herman
366	1	10-15		1.6236	5.4	82.371	Booth 7, Bl 5
446	2			1.6243	4.9	82.934	Row 15 T1
383	3			1.6234	5.5	82.934	
432	4			1.6253	4.3	84.609	October 16
347	5			1.6239	5.2	84.309	% moisture
463	6			1.6229	5.8	83.117	loss on 10g
534	7			1.6254	4.2	84.015	sample dry
330	8			1.6229	5.8	82.209	at 75° T1
409	9			1.6235	5.4	82.300	
410	10			1.6250	4.5	83.850	
							October 16
466	1	10-16		16223	6.1	80.411	Booth 7, Bl
465	2			1.6219	6.4	82.552	R9 T2
451	3			1.6216	6.6	82.217	
425	4			1.6218	6.4	81.718	Oct. 17
436	5			1.6207	7.1	80.400	
448	6			1.6224	6.1	82.317	% moisture
346	7			1.6248	4.6	84.815	on 10 g. sa
619	8			1.6222	6.2	80.458	dry wt at 75
619	9			1.6208	7.1	81.700	
626	10			1.6224	6.1	82.535	
626	100			1.6223	6.1	82.734	

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Weight		Date	R. I.	% Oil	October 19
458	1.	10-19	1.6228	5.8	81.207	Lula, Bl. 5,
547	2.		1.6223	6.1	82.334	R16 T1
446	3.		1.6216	6.6	81.337	
522	4.		1.6207	7.1	80.039	
541	5.		1.6211	6.9	81.187	
597	6.		1.6200	7.6	81.238	
547	7		1.6220	6.3	81.734	
539	8.		1.6223	6.1	53.237	
559	9		1.6218	6.4	80.668	
552	10		1.6206	7.2	81.186	
2648	(5 fruit)	10-19	1.6225	6.7		Lula - CA Lounsbury

						October 20
814	1	10-20	1.6203	7.4	79.681	Lula, Block 9.
830	2		1.6183	8.7	78.942	R2 T3
801	3		1.6219	6.4	82.851	
852	4		1.6192	8.1	77.346	
778	5		1.6204	7.3	61.300	% moisture loss
775	6		1.6207	7.1	80.000	on 10 g. drying
808	7		1.6205	7.2	82.485	at 75°C
766	8		1.6177	9.1	79.162	
799	9		1.6195	7.9	78.621	
747	11		1.6197	7.8	78.633	

					October 21, 1953
1725	(4 fruit)	10-20	1.6223	6.1	Lula E. L. McBee
2333	(5 fruit)		1.6210	6.9	Lula, McBride
2631	(5 fruit)		1.6217	6.5	Lula, Vic Johnson
2234	(5 fruit)		1.6209	7.0	Lula, Bob Browne
706	8A	10-20	1.6175	9.2	R2 Lula R2T3, Bl. 9
747	10A	10-20	1.6196	7.8	Lula, R2T3, Bl. 9

Weight	Plate	Date		R. I.	% Oil	
2224 (5 pm		10-21		1.6230	57	October 21 Bowl 7 Bob Bean
526	1	10-21			78.286	October 22
648	2			1.6150	110% 77.522	Lula, Long Hill
446	3			1.6164	105% 77.544	Lake Place
344	4			1.6181	88% 78.486	9 marathons
386	5			1.6180	89% 77.567	
2660		10-21		1.6250	45 83.716	Taylor, Long Hill
5204	1	10-22	5 7	1.6221	63	Lula, Kendall
4275	2	"	5 4	1.6234	55	
3820		"		1.6190	83	Lula, Hay
						October 22
4246	1	10-22	6 4	1.6209	70	Lula Brown
3592	2		6 5	1.6221	63	
3098				1.6223	6.1	Taylor Brook
4512				1.6201	7.5	Brook, Kendall
3727	1			1.6227	59	Brook 8 Hay
2341	2	"		1.6215	67	
3926	1	10-22		1.6224	6.1	Brook 8 Cook
2866	2			1.6229	58	
5192				1.6214	67	Brook 7 Kendall
4465				1.623	57	Brook 3 Hay
						October 22
3280	1	10-22		1.6237	59	Brook 8 Cook
3219	2	"		1.6235	54	
6372		10-22		1.6194	50	Brook 7 Kelsey

Weight		Date	R. I.	% Oil	
3167		10-22	1.6193	8.0	October 26 Bord 1, Rheney
3335			1.6190	8.3	Bord 3, Rheney
3678			1.6224	6.1	Taylor, Rheney
					October 26
496	1	10-26	1.6244	4.6	83.504 Bord 7, Block 5
493	2		1.6238	5.3	83.233 R 15 T 1
506	3		1.6235	5.4	82.734
442	4		1.6249	4.6	83.033 % moisture
448	5		1.6244	4.9	83.316 Loss on 10 g
432	6		1.6255	4.2	84.415 sample drying
434	7		1.6252	4.4	84.431 at 70° C
439	8		1.6255	4.2	84.115
423	9		1.6242	5.0	84.346
372	10		1.6222	6.2	79.641
779		10-27	1.6227	5.9	October 27 Seedling, Oxley
2601 (4 fruit)		10-27	1.6219	6.4	Bord 7 & 9 Light
2373 (4 fruit)		10-27	1.6193	8.0	Lula, Sunland
3072 (5 fruit)		10-27	1.6230	6.3	Lula, Aladay
3881 (6 fruit)		10-27	1.6206	7.2	Lula, Tony O. Ond
4661 (8 fruit)		10-27	1.6190	8.3	Lula, McMillan
5184 (9 fruit)		10-27	1.6207	7.1	Gin - Lula
4188 (10 fruit)		10-27	1.6227	5.9	Lula, Shafer

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Weight		Date		RI	% Oil		Varieties
618	1	10-27		1.6219	64	77.243	Bard ? Ry
602	2	"		1.6201	75	80.019	Rye Ts
572	3	"		1.6220	63	81.455	
608	4	"		1.6212	65	80.219	Oats Barley
468	5	"		1.6204	73	79.520	
538	6	"		1.6216	65	81.400	% mixture
522	7	"		1.62120	68	81.618	
517	8	"		1.6196	78	79.441	
445	9	"		1.6212	68	80.619	
537	10	"		1.6211	69	79.920	
5423							
							October 28
8740	1	10-28		1.6190	83		Bard ?
4320	2	"		1.6192	81		Rhey
							October 29
5109	1	10-28		1.6197	78		Bard ? Rye
5219	1	10-28	5.8	1.6219	64		Lab Rye
4072	2	"	5.5	1.6233	55		
5439	1	10-28	6.0	1.6204	72		Lab Barley
3975	2	"	6.0	1.6216	66		
5072	(9 found)	10-29		1.6214	67		Lab Pollen
4903	(9 found)	10-29		1.6212	68		Lab Rhey
4820		10-28		1.6171	95		Bard Rhey
3748	1	"		1.6214	67		Bard Rye
2563	2	"		1.6224	61		
4055	1	"		1.6283	68		Bard ? Rye
2504	2	"		1.6219	64		
							October 30
3466	1	10-28		1.6293	55		Bard ?
2765	2	"		1.6252	64		Rye

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Weight		Date	R.I.	% Oil	
					October 30
4921	1	10-28	1.6229	5.9	Booth 3 Hog
3603	2	"	1.6227	5.9	
					~~Hart Hog~~
5762		10-28	1.6224	61	Hall Hog
5367		10-30	1.6207	71	Lola, Hankins
5379		10-30	1.6222	62	Booth Hankins
5115		10-28	1.6232	56	Nall, Kinney
3882		10-28	1.6203	70	Hankins Cooke
4463		10-28	1.6206	73	Hankins Kinney
					October 31
3625	1	10-28	1.6197	78	Taylor, Brooks
2784	2	"	1.6215	64	
3624		10-28	1.6205	72	Taylor Kinney
					November 2
483	1	11-2	1.6198	79	79.030 Lola, Block 5
505	2	"	1.6202	74	77.522 R16 T1
592	3	"	1.6208	71	81.455
526	4	"	1.6193	80	78.820
567	5	"	1.6180	89	77.364 To macerate by
645	6	"	1.6197	71	80.200 of 10 g sample
626	7	"	1.6165	99	78.664 Hy. Lg at 75°C
669	8	"	1.6205	72	78.962
516	9	"	1.6206	72	80.009
508	10	"	1.6188	84	80.957
					November 2
515	1	11-2	1.6252	63	84.715 Booth, Bl. 5
331	2	"	1.6246	47	89.916 R15 T1
439	3	"	1.6244	49	86.327
437	4	"	1.6250	45	90.234

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Weight	Date		K.I.	% Cl	% Montmor.	Remarks
466	5	11-2	1.6240	51	82.751	Bond?
524	6	"	1.6244	49	82.017	Kist.
452	7		1.6243	49	83.616	
483	8		1.6242	50	82.934	
476	9		1.6245	45	83.948	
463	10		1.6204	73	78.664	
463	10B		1.6194	84		Bond? Kist.
8724	11-4		1.6186	85		Newman - Lula Bay
662	1.	11-4	1.6197	7.5	79.300	Lula Bond? R2 T3
637	2	"	1.6187	84	77.944	
601	3	"	1.6184	86	75.473	
586	4	"	1.6176	9.2	76.071	
548	5	"	1.6200	7.6	78.364	
552	6	"	1.6165	9.9	76.047	
550	7	"	1.6173	9.4	76.523	
444	8	"	1.6177	9.1	76.570	
447	9	"	1.6201	7.5	76.447	
427	10	"	1.6218	6.4	76.969	
5454				8.39		
601	1.	11-4	1.6201	7.5	80.257	November 5 Bond? Blue? R3 T2
642	2	"	1.683	8.7	79.561	
548	3	"	1.6210	6.9	80.938	
483	4	"	1.6175	9.2	77.[illegible]	
585	5	"	1.6222	6.2	82.035	
582	6	"	1.6195	7.7	80.535	
536	7	"	1.6211	6.9	81.187	
503	8	"	1.6178	9.0	78.343	
494	9	"	1.6220	6.2	81.536	
449	10	"	1.6221	6.3	82.23	
				7.16		
5964		11-5	1.6195	7.9		Bond? Bay

Weight	Date	R. D.	% Oil	% Moisture	Nov. 6
468	1 11-2	1.6203	7.4	78.143	Both 7.
455	2	1.6218	6.7	76 370	Adulter
490	3	1.6204	7.3	77.922	
433	4	1.6199	7.6	77.844	
530	5	1.6232	5.6	79.400	
501	6	1.6204	7.3	76.646	
486	7	1.6221	6.3	78 542	
492	8	1.6246	4.7	79 141	
508	9	1.6223	6.1	79 430	
458	10	1.6216	6.6	77.100	
322	1 11-6	1.6188	5.4	81.700	Both 8 81.95
296	2	1.6224	6.1	82.133	
327	3	1.6247	4.7	82.417	
341	4	1.6214	6.7	81.037	Nov. 7
385	5	1.6223	6.1	81.900	
364	6	1.6225	6.0	81 237	
361	7	1.6226	6.0	81 237	
323	8	1.6215	6.7	80.819	
311	9	1.6235	5.4	81 437	
307	10	1.6226	6.0	81 200	
					November 9
5132	11-9	1.6191	8.2		Lala, Crown #2
5548	11-9	1.6178	9.0		Lala, Cornelius
4946	11-9	1.6207	7.1		Lala, O.J. Light
5752	11-9	1.6190	10.2		Lala, Raven
5078	11-9	1.6181	8.8		Lala, Hayes Co.
7425 (6 feet)	1 11-9	1.6195	7.9		Alaska
3005 (6 feet)	2	1.6205	7.2		"

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weight		Date	R.I.	% Oil	% Moisture	Nov 9
418	1	11-9	1.6157	5.4	81.836	Taylor, Mrs
409	2		1.6190	8.3	81.85	
374	3		1.6190	8.3	81.237	
352	4		1.6165	9.9	80.719	Nov 10
393	5		1.6175	9.0	79.400	
373	6		1.6220	6.2	82.600	
380	7		1.6192	8.1	81.455	
376	8		1.6188	8.4	82.019	
434	9		1.6214	6.7	83.646	
417	10		1.6208	7.1	81.800	

				Nov 10
4859	11-10	1.6193	8.0	Lula, O'Donnell
4716	11-10	1.6158	10.4	Lula, J Stell
3051 (6 female)	11-10	1.6207	7.1	Lula, Lenard Hodden
5865	11-10	1.6224	6.0	Lula, Kimball (Harris)
5179	11-10	1.6202	7.4	Lula, Collins
5012 (6 female)	11-10	1.6208	7.1	Lula, Ebony

				November 11
3546 (8 female)	11-11	1.6223	6.1	Lula, B Harris
3089 (7 female)	11-11	1.6235	5.4	Lula, Harris Mother
3334 (7 female)	11-11	1.6235	5.3	Bovill, Mother
4080 (8 female)	11-11	1.6213	6.8	Lula Camp
3193 (7 female)	11-11	1.6230	5.7	Bovill, Harris
3089 (7 female)	11-11	1.6218	6.4	Lula, Mother 2
3234 (7 female)	11-11	1.6235	5.4	Bovill, Mother 2

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Weight		Date		R.I.	% Oil	November 12
3812 (8 fruit)		11-11		1.6227	5.9	Lula, Schafer
3343 (7 fruit)		11-11		1.6236	5.5	Booth 9, Ample
5608	1	11-10	b.2	1.6210	6.9	Lula, Kendall Farm
4541	2	"	b.0	1.6221	6.3	
4138		11-10		1.6211	6.9	Nielsen Kendall Farm
4551		"		1.6200	7.6	Nielsen Klemz
3656		11-10		1.6199	7.6	Taylor, Brooks
3762		11-10		1.6200	7.6	November 13 Taylor, Klemz
5863	1	11-10		1.6199	9.1	Booth 1, Klemz
4355	2			1.6162	10.1	
4236		11-10		1.6195	7.9	Booth 1, Kendall
4071	1	11-10		1.6216	6.6	Booth 9, Hay
2786	2			1.6294	8.0	
4374	1	11-10		1.6216	6.6	Booth 9, Kendall
3936	2			1.6219	6.4	
5543	1	11-10	b.6	1.6204	7.3	Lula, Brooks
4314	2		b.7	1.6213	6.8	
4342	1	11-11		1.6216	6.6	Booth 9, Brooks
2977	2			1.6223	6.1	
2486	28			1.6211	6.9	Booth 9, Hay

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Weight	Date	R.I.	% Oil	November 16
1019	11-10	1.6208	7.1	Hall, Hay
4948	11-10	1.6214	6.7	Boyd 3, Hay
4424	11-10	1.6202	7.6	Boyd 3, Kheney
5036	11-10	1.6210	6.9	Boyd 7, Tindall
6244	1. 11-10	1.6173	9.4	Boyd 7, Kheney
6601	2 11-10	1.6171	9.5	Boyd 7, Kheney
5469	11-10	1.6220	6.9	Hall, Kheney
4466	(8 feed) 11-16	1.6213	6.8	Lula, Shafer
5390	(8 feed) 11-16	1.6163	10.0	Lula, McMillan
4522	(8 feed) 11-16	1.6203	7.4	Lula, Dean
5080	(8 feed) 11-16	1.6202	7.6	Lula, Ebony
4155	(8 feed) 11-16	1.6220	6.3	November 7 Lula, [illegible]
4232	(8 feed) 11-16	1.6209	7.0	Lula, [illegible]
4613	(8 feed) 11-17	1.6178	9.0	Lula, Coal
4804	(8 feed) 11-17	1.6183	8.7	Lula, Delaware
5219	11-17	1.6179	9.0	Boyd 7, Kheney
2381	11-17	1.6211	6.9	Boyd 7, Tindall
3867	1 11-17	6.4 1.6210	6.9	Lula, Tindall
4888	2	6.5 1.6215	6.7	

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Weight		Date		R. I.	% Oil	November 18, 1919
5801	1	11-17	8.2	16175	90	Lula, Brooks
4403	2		6.7	16211	69	
3930	1	11-17		1.6168	97	Taylor, Brooks
2998	2			1.6206	7.2	
3943		11-17		1.6193	8.0	Taylor, Cleary
4139		11-17		1.6210	6.9	Bond 8, Brooks
4893		11-17		1.6206	7.2	Bond 3, Hay
6383		11-17		1.6195	7.9	Hall, Hay
4083		11-17		1.6200	7.6	Nickson, Kendall
5661		11-17		1.6151	11.9	Bond, Cleary
5917		11-16		16207	71	November 19 Hall, Cleary
708	1	11-19		1.6190	8.3	79541 Lula, Bl 8
661	2			1.6170	9.6	77268 R&T3
600	3			1.6163	10.0	77400
608	4			1.6176	9.2	78842
601	5			1.6181	8.9	75748
569	6			1.6145	11.3	76371
491	7			16202	7.4	78043
489	8			1.6200	7.6	77506
460	9			1.6199	7.6	76923
440	10			1.6202	7.4	81049
569	6			1.6150	11.0	Lula, Bl 8 T3

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Weight		Date	R.I.	% Ash	% Moisture	Nov. 20
643	1.	11-20	1.6195	7.9	80.041	Lab, Bl. 5
507	2		1.6229	5.8	79.130	R17 T1
527	3		1.6214	6.7	79.141	
521	4		1.6216	6.6	80.200	
520	5		1.6196	7.8	79.141	
501	6		1.6186	8.5	77.822	
551	7		1.6191	8.2	81.018	
519	8		1.6206	7.2	79.661	
532	9		1.6191	8.2	78.900	
410	10		1.6221	6.3	78.36 d	

621	1	11-20	1.6148	11.1	74.601	Booth 7, Bl. 9
619	2		1.6165	9.9	74.502	R1 T2 – Nov. 22
711	3		1.6180	8.9	78.221	
618	4		1.6153	10.7	75.000	
543	5		1.6171	9.5	77.145	
645	6		1.6173	9.4	74.550	
548	7		1.6198	7.7	75.872	
578	8		1.6194	8.1	78.255	
518	9		1.6206	7.2	76.923	Nov. 22
521	10		1.6165	9.9	74.376	
				9.25		
586	1.	11-23	1.6229	5.8	81.318	Booth 7,
525	2		1.6229	5.8	80.719	Bl. 5, R15 T1
528	3		1.6238	5.2	80.265	
466	4		1.6221	6.3	79.781	
481	5		1.6256	4.1	82.951	
412	6		1.6226	6.0	81.237	
429	7		1.6229	5.8	80.838	
394	8		1.6228	5.8	80.519	
471	9		1.6230	5.7	81.087	
387	10		1.6251	4.4	83.316	

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Weight	Date	R. I.	% Ash	% Moisture	Nov 24 Taylor Co. 5
473	1. 11-24	1.6195	7.7	82.617	
430	2	1.6172	9.4	81.118	
410	3	1.6178	9.6	79.500	
396	4	1.6199	7.6	83.665	
376	5	1.6185	8.6	81.256	
352	6	1.6185	8.6	81.500	
362	7	1.6175	9.2	79.960	
375	8	1.6201	7.5	82.000	
361	9	1.6172	7.4	79.560	
351	10	1.6184	8.6	82.400	
					Nov. 26 Bond 8 Co. 5
406	1. 11-26	1.6215	6.7	79.881	
385	2	1.6220	6.3	78.961	
376	3	1.6210	6.9	79.241	
391	4	1.6226	6.0	80.179	
382	5	1.6207	7.1	77.884	
357	6	1.6228	5.8	81.318	
306	7	1.6228	5.3	81.318	
291	8	1.6237	5.3	82.734	
283	9	1.6240	5.1	82.135	
275	10	1.6230	5.7	79.900	
					Nov. 28 Lula Co 9, R3T3
772	1 11-28	1.6149	11.1	75.449	
664	2	1.6160	10.2	75.249	
699	3	1.6178	9.0	76.992	
650	4	1.6186	8.6	78.664	
662	5	1.6172	9.4	76.123	
625	6	1.6175	9.2	78.023	
837	7	1.6161	10.2	75.359	
581	8	1.6195	7.9	77.622	
592	9	1.6202	7.4	77.400	
562	10	1.6176	9.2	79.900	

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Weight		Date	R.I.	% Ol	% Montmor.	Nov 23
562	1	11-28	1.6218	6.4	81.318	Lake, Ill's
553	2		1.6207	7.1	81.037	R.I. T.
641	3		1.6196	7.8	79.461	
508	4		1.6231	5.7	80.139	
448	5		1.6235	5.4	80.339	
495	6		1.6226	6.0	79.341	
515	7		1.6209	7.0	79.780	Nov 24
421	8		1.6220	6.3	80.677	
435	9		1.6224	6.1	78.364	
404	10		1.6230	6.3	82.575	
				5.41		
						Lake, Ill's
4934		11-30	1.6220	6.3		R.I. T.
5071		11-30	1.6182	8.8		Lake, Light
5105		11-30	1.6180	8.9		Lake, Alaska
5805		11-30	1.6161	10.2		Lake, Conn.
4826		11-30	1.6172	9.4		Lake, Rhom
684	1	11-30	1.6189	8.3	75.324	Wash. Ill's
676	2		1.6151	10.9	74.825	R.I. T.
567	3		1.6167	9.8	76.370	October.
584	4		1.6161	10.2	76.646	
616	5		1.6165	9.9	75.772	
663	6		1.6158	10.4	77.345	
648	7		1.6171	9.5	78.364	
617	8		1.6164	10.0	77.667	
589	9		1.6175	9.2	75.748	
484	10		1.6186	8.5	75.573	
						Lake 2
4818	1	12-1	1.6169	9.6		Lake, Ill's 1
3508	2	9.6	1.6178	9.4		

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ight	Date	R	G	% bbl	December 2.
615	1 12-1	6.9	1.6195	9.7	Lake, Brooks
619	2	8.5	1.6182	8.8	
991	1 12-1	7.2	1.6193	8.0	Lake - Kendall
93	2	6.9	1.6206	7.2	
151	12-1		1.6154	10.7	Booth 1, Rheney
					Nov December 2
005	12-1		1.6199	7.6	Hall, Rheney
15	1		1.6193	8.0	Lake, Brooks
029	1		1.6188	8.4	Booth 7, Kendall
157	2		1.6181	8.8	
145			1.6170	9.6	Taylor, Brooks
153			1.6181	8.8	Hayley, Rheney
178			1.6156	10.5	Booth 3, Rheney
194			1.6188	8.4	Booth 3 Hay
162	1		1.6159	8.3	Booth 8, Brooks
195	2		1.6178	9.3	
					December 4
159			1.6163	10.0	Hickson, Rheney
168			1.6186	8.5	Booth 7, Rheney
144			1.6170	9.6	Hickson, Kendall

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Weight	Date	R.I.	% Ash	% Moisture	Qual.
612	1. 12-4	1.6193	8.8	75.178	Lake, Bl 1
557	2. "	1.6147	11.2	75.748	R 3 Ts
504	3.	1.6186	8.5	77.096	
476	4.	1.6192	8.11	77.263	
435	5. "	1.6188	8.7	78.863	
4483			8.7		
557	1. 12-4	1.6175	9.2	76.548	Lake, Bl 5
513	2.	1.6173	9.4	75.709	R 18 Ts
538	3.	1.6178	9.0	76.646	
527	4.	1.6199	7.6	77.832	
525	5.	1.6176	9.2	75.142	Dec. 5
5246					
511	12-5	1.6211	6.9	76.223	Lake, Bl 9, R 16 Ts, Dec. 5
563	12-5	1.6189	8.4	77.845	Lake, Bl 5, R 15 Ts
542	12-5	1.6198	7.7	77.667	Lake, Bl 5, Dec
501	12-5	1.6205	7.2	78.245	Lake, Bl 5, R 15 Ts
520	12-5	1.6175	9.2	76.744	Lake, Bl 5, R 15 Ts
546	12-5	1.6195	7.9	76.493	Lake, Bl 5, R 15 Ts
					Screenlost
5990	12-7	1.6193	8.0		Lake, Bl 9, R 16 Ts
5168	12-7	1.6206	7.2		Lake, Bl 9, R 8 Ts
5433	12-7	1.6203	7.4		Lake, Bl 9, R 8 Ts
5310	12-7	1.6201	7.5		Lake, Bl 9, R 8 Ts
6245	12-7	1.6214	6.7		Lake, Bl 9, R 8 Ts
4696	12-7	1.6197	8.4		Lake, Bl 9, R 8 Ts

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Weight	Date		R.I.	% Oil	% Moisture	Dec.
604	1	12-7	1.6218	6.2		Lula, Ill. R.17 T.24
666	2	"	1.6206	7.2		
463	3	"	1.6250	4.5	76.294	
607	4	"	1.6222	6.1		
646	5	"	1.6188	8.4		
640	6	"	1.6227	5.9	78.152	Dec 1
707	7	"	1.6195	9.9		
639	8	"	1.6235	5.1	78.742	
636	9	"	1.6199	7.6		
571	10	"	1.6205	7.2		
463	38	12-7	1.6244	4.9		
640	68	12-7	1.6226	6.0		
639	98	12-7	1.6235	6.4		
657	28	12-4	1.6163	10.7		Lula, Ill. R.13 T.3
435	58	12-4	1.6187	8.4		Lula, Ill. R.13 T.3
4450 (6 fruit)		12-1	1.6163	10.0		Hall, Clay
5442	1	12-8	7.1 1.6196	7.8		Lula, Bowles
4525	2	"	6.9 1.6208	7.1		
						December
5566	1	12-8	7.3 1.6194	8.0		Lula, Kendall
4504	2	"	6.9 1.6207	7.1		
3819 (6 fruit)		12-1	1.6198	7.7		Choquette, Hudson
5789		12-8	1.6211	6.9		Hall, Clay
3974		12-8	1.6163	10.0		Taylor, Bowles
4208		12-8	1.6169	9.6		Taylor, Clay

Nr	Date	C P J.	% bl	% Moisture	December 10
1	12-10	1.6152	8.8	76.669	Bowl 7, Bl. 5
2	-	1.6218	6.4	79.860	R 15 T1
3	-	1.6204	7.3	77.300	
4	-	1.6211	6.9	79.800	
5	-	1.6202	7.4	78.784	
6	-	1.6184	8.6	78.386	
7	-	1.6201	7.5	78.428	
8	-	1.6200	7.6	77.032	
9	-	1.6208	7.1	80.239	
10	-	1.6219	6.4	79.940	dec 11
1	12-11	1.6198	7.9	76.257	December 11
2		1.6150	11.0	76.880	Bowl 7, Bl. 9
3		1.6147	11.2	75.398	Ra T1
4		1.6158	10.4	76.047	
5		1.6164	11.4	74.775	
6		1.6195	7.9	76.200	
7	12-11	1.6135	12.0	73.900	Dec 14
8		1.6166	9.8	75.473	
9		1.6152	10.8	74.576	
10		1.6177	9.1	77.600	
			9.1		
					Dec. 16
1	12-14	1.6218	6.4	82.185	Lake, Bl 9
2	"	1.6182	8.8	78.524	R 9 T6
3	"	1.6164	10.0	75.700	
4	"	1.6163	10.0	75.968	Dec 15
5	"	1.6162	10.1	75.948	
6	-	1.6141	11.6	73.080	
7	-	1.6173	9.4	72.624	
8	-	1.6196	7.8	77.367	
9	-	1.6173	9.4	70.529	
10	-	1.6209	7.0	78.600	
1	12-15	1.6158	10.4		Lake, Booster
2	9-21	1.6173	9.4		Dec. 16 4L

Weight		Date		R.I.	% Oil		
5697	1	12-15	7.2	1.6193	8.0		December Lake, Kindl
4622	2	"	7.7	1.6193	8.0		
3478		12-15		1.6182	8.8		Kindl & Hay
4058		12-15		1.6131	10.9		Taylor, Kindl
5742		12-15		1.6171	9.5		Kindl, Clay
6065		12-15		1.6214	6.7		Hall, Clay
4242		12-15		1.6189	8.3		Nelson, Kindl
5418		12-15		1.6159	10.2		Kindl, Clay
4984		12-15		1.6195	8.6		Kindl & Hay
620	1	12-17		1.6129	12.5		December Lake, Mc Millan
646	2	"		1.6120	12.1		
579	3	"		1.6133	12.2		December
572	4	"		1.6178	9.0		
473	5	"		1.6166	9.8		
425	6	"		1.6126	12.8		
5735							
566	1	12-17		1.6175	9.2	74.725	December Lake, Mississ
589	2	"		1.6199	7.6	76.846	
471	3	"		1.6144	11.4	73.928	
473	4	"		1.6203	7.4	75.634	
596	5	"		1.6185	8.4	77.526	December
563	6	"		1.6202	5.0	76.300	
525	7	"		1.6164	10.5	74.177	
465	9	"		1.6201	7.1	80.451	
509	9	"		1.6205	7.2	76.425	
547	10	"		1.6223	6.1	76.522	

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Weight	Date	RS	% Oil	Nov. 19 1952	1953
					December 21
8626	12-21	1.6126	12.6	8.7	Lula, Okl, R9 T19
5983	12-21	1.6158	11.0	12.2	Lula, Okl, R9 T19
6071	12-21	1.6136	11.9	12.6	Lula, Okl, R9 T19
5537	12-21	1.6152	10.8	9.5	Lula, Okl, R8 T22
5380	12-21	1.6125	12.7	11.6	Lula, Okl, R6 T19
5994	12-21	1.6141	11.6	9.8	Lula, Okl, R6 T19
5818	12-21	1.6150	11.2	10.1	Lula, Okl, R8 T19
					Dec 22
5253	12-21	1.6128	12.5	12.0	Lula, Okl, R9 T22
5401	12 21	1.6151	10.4	10.7	Lula, Okl R8 T22
7374	12-29	1.6184	8.6		Agee Lake 29 Hall, Kinney
					December 30
6023	12-29	1.6163	10.0		Buell 3, Hays
4345	12-29	1.6173	9.4		Goodall Ray December 31
4612	12-29	1.6153	10.7		Lula, Brooks
3508	12-29	1.6171	9.5		Lula, Kimball
3730	12-29	1.6164	8.6		Taylor, Brooks
					Jan. 12 1954
5297	1 1-12	1.6148	11.1		Lula, Brooks
4632	2	1.6174	9.3		
4153	1 1-12	1.6144	11.5		Taylor, Brooks
3158	2	1.6158	10.4		41

1445	2	6-[illegible]-54	1.6302	1.6	June 3, 1954 Tucker, Kendall
1544	2	6-3-54	1.6302	1.6	
2257		6-14-54	1.6298	1.8	June 18, 1954 Tucker Kendall
3407		6-21-54	1.6284	2.6	June 22, 1954 Tucker, Brooks
3678		6-28-54	1.6272	3.2	June 29, 1954 Tucker, O. [illegible]
3060		7-9-54	1.6276	3.0	July 12, 1954 Tucker Brooks
3060		7-19-54	1.6268	3.4	July 20, 1954 Walden, Kinney
3495		7-26-54	1.6269	3.4	July 27, 1954 Walden, Kinney
3132		8-2-54	1.6264	3.6	August 3, 1954 Walden, Kinney
3081		"	1.6272	3.2	Walden, Kendall
4311		"	1.6265	3.6	Walden, Amos
3341		8-9-54	1.6270	3.3	Aug. 10, 1954 Walden, Tucker
3632		"	1.6261	3.8	Walden Kinney
3313		"	1.6262	3.8	Walden, Amos

Weight	Date	R J	% Oil	
				August 18, 1954
3801	F-16	1.6261	3.8	Walden, Ames
3687		1.6258	4.0	Walden, Rhoney
3914	"	1.6266	3.5	Walden, Kendall
2876		1.6262	3.8	Booth 8, Kendall
				August 24, 1954
3896	F 23	1.6272	3.2	Walden, Kendall
3790	"	1.6258	4.0	Walden, Rhoney
3761	"	1.6255	4.2	Walden, Ames
3126	"	1.6259	4.0	Booth 8, Kendall
2427	"	1.6272	3.2	Booth 8, Flag
2881	"	1.6267	3.5	Booth 8, Brooks
3365	"	1.6275	2.9	Sula, Kendall
3620	"	1.6256	4.1	Sula, Brooks
				August 30, 1954
4366	F 30	1.6250	4.5	Walden, Rhoney
3425	"	1.6257	4.1	Booth 8, Flag
				August 31, 1954
4049		1.6268	3.4	Walden, Ames
3963	"	1.6254	4.2	Walden, Kendall
3553		1.6274	3.1	Sula, Kendall

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Weight	Date	R.I.	% Oil	
				Argonaut & Nor
3096	8-30	1.6272	3.2	Lula, Clay
3677	"	1.6262	3.8	Lula, Bonita
3195	"	1.6265	3.6	Bond & Bonita
				Sept. 8, 1934
4199	9-7	1.6255	4.2	Walden, Kendall
3567	"	1.6256	4.1	
4912	"	1.6251	4.4	Walden, Anna
3848		1.6258	4.0	
4902	"	1.62 42 43	5.0	Walden, Elsing
3412	"	1.62	4.1	
4326	"	1.6247	4.7	Lula, Bonita
3428	"	1.6251	4.4	
4080	"	1.6243	4.9	Lula, Clay
3285	"	1.6255	4.2	
3551	"	1.6244	4.9	Bond & Bonita
2556	"	1.6257	4.1	
				Sept. 9, 1934
3415	"	1.6250	4.5	Bond, Clay
2646	"	1.6262	3.8	
3945	"	1.6258	4.0	Bond, Bonita
2941	"	1.6262	4.4	
3998	"	1.6262	3.8	Lula, Kendall
3025	"	1.6271	3.3	

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Sample	Date	R.I.	% Oil	September 14, 1916
4096	9-12	1.6237	5.3	Board 8, Kendall
2949		1.6250	4.6	
3152		1.6251	4.4	Board 5, Flag
2877		1.6252	4.4	
3343		1.6253	4.3	Board 8, Brooks
2389		1.6260	3.9	
4391		1.6257	4.4	Lula, Kendall
3403		1.6262	3.8	
4067		1.6245	4.8	Lula, Flag
3418		1.6253	4.3	
4329		1.6240	5.1	Lula, Brooks
3276		1.6252	4.4	
				September 15
3570	9-13	1.6254	4.2	Board 7, Flag
2865		1.6261	3.5	
4632	9-14	1.6238	5.3	Flag, Board 8
				September 18
2801 (4 punct)	9-17	1.6251	4.4	Kelly, McRae
				September 20
3282	9-20	1.6239	5.2	Board 7, Kendall
2947		1.6247	4.7	
				September 21
3896	9-20	1.6242	5.0	Board 8, Brooks
2609		1.6263	3.7	
2944	9-20	1.6253	4.3	Board 8, Flag
1934		1.6235	5.4	

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Weight	Date	C.I.	% Ext	September 21
3551	9-20	1.6243	4.9	Booth & Kendall
3016		1.6243	4.9	
4389	9-20	1.6242	6.0	Lula, Kendall
3665		1.6262	4.4	
4411	9-20	1.6232	5.6	Lula, Hay
3726		1.6239	5.2	
4451	9-20	1.6237	5.3	Lula, Brooks
3538		1.6248	4.6	
4442	9-20	1.6211	6.9	September 22 Anderson, Riley
3565		1.6215	6.7	
3310	9-24	1242	5.0	Sept. 27, 1924 Booth & Hay
2388		1.6235	5.4	
3352	9-27	1.6231	5.7	Hoole & Brooks
2688		1.6238	5.2	
4667	9-27	1.6231	5.7	Sept. 29, 1924 Lula, Hay
3637		1.6233	5.5	
4406	9-27	1.6249	4.6	Lula, Kendall
3902		1.6241	4.6	
3900	9-27	1.6222	6.2	Booth & Kendall
2746		1.6239	5.2	
4705	9-27	1.6241	5.1	Lula, Brooks
3746		1.6230	5.7	

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Weight	Date	R.D.	Gravity	October 1, 1904
4459	10-4	1.6217	6.5	Lula, Hay.
3841		1.6224	6.1	
4160	10-4	1.6228	6.8	Lula, Brooks
3697		1.6235	5.4	
				October 5
3498	10-4	1.6233	5.5	Board 8, Brooks
2684		1.6237	5.3	
3315	10-4	1.6232	5.6	Board 8, Hay
2141		1.6215	6.7	
3881	10-4	1.6225	6.0	Board 8, Kendall.
3794		1.6241	5.1	
5161	10-4	1.6232	5.6	Lula, Kendall
4037		1.6239	5.2	
4707	10-4	1.6217	6.5	Board 7, Olney
3556		1.6225	6.0	
4615	10-4	1.6230	5.7	Board 4, Brooks
3374		1.6229	5.8	
				October 6
4580	10-4	1.6203	7.4	Hudson, Olney
2992		1.6205	7.2	

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Weight	Date	R.T.	% Oil	October 12, 1954
4937	10-11	1.6212	6.8	Lula, Brooks
4178		1.6220	6.3	
				October 12 1954
3686	10-11	1.6235	5.4	Booth & Flag
2751		1.6233	5.6	
5103	10-11	1.6228	5.8	Booth & Brooks
3921		1.6222	6.2	
3862	10-11	1.6213	6.1	Booth & Brooks
2599		1.6216	6.6	
3334	10-11	1.6225	6.0	Booth & Kendall
2731		1.6238	5.3	
5225	10-11	1.6216	6.6	Lula, Kendall
4216		1.6236	5.4	
				October 13, 1954
4434	10-11	1.6191	7.7	Nickson & Henry
3496		1.6204	7.3	
5054	10-11	1.6209	7.0	Lula, Flag
4112		1.6211	6.9	
5907	10-11	1.6206	7.2	Collinsville
				October 14, 1954
5631	10-12	1.6205	7.2	Lula, Chandler Mix
5895	10-12	1.6219	6.4	Lula, McMillan
6300	10-13	1.6218	6.4	Lula, Cook
5142	10-13	1.6220	6.3	Lula, Aladdin

Weight	Date	R.S.	% Oil	October 14 1930
2748 (5 fruit)	10-14	1.6205	7.2	Lula, Conway
2560 (5)	10-14	1.6234	5.5	Alday, Lula
2726 (5)	10-14	1.6229	5.9	Lula, R.S. Higgins
2864 (5)	10-14	1.6194	8.0	Lula, Carl Biggers
4158	10-14	1.6192	8.1	Hickson, Chandler
4010	10-14	1.6214	6.7	Hickson, Kendall
5448	10-13	6222	6.2	Lula, V. Johnson
5147	10-13	1.6220	6.3	October 15 Lula, Chandler #
5380	10-13	1.6239	5.2	Lula, Chandler, S.R.
5243	10-13	1.6204	7.3	Camp, Camp
1981 (2 fruit)	10-15	1.6221	6.3	October 16 Lula, Dunn, D.H.
1972 (2 fruit)	10-15	1.6194	8.0	Lula, Dunn, H.E.
2560 (2 fruit)	10-18	1.6202	7.-	October 18 Lula, J. Cooper (Boy)
1781 (4 fruit)	10-18	1.6234	6.0	Lula, Dunn, 88
2673 (5 fruit)	10-18	1.6223	6.1	Lula, Dunn
2829 (5 fruit)	10-18	1.6190	8.3	Lula, R.S. Higgins
2705 (5 fruit)	10-18	1.6213	6.8	Lula, Frank Cathcart
2916 (5 fruit)	10 18	1.6205	7.1	Lula, Cooper #82

Weight	Date	S.G.	Oil	October 16
2579	(5 fruit) 10-18	1.6211	6.9	Lake, Hamilton
3356	(5 fruit) 10-18	1.6210	6.9	Lake, Clay
2874	(5 fruit) 10-18	1.6239	5.2	Lake, McKee
2490	(5 fruit) 10-18	1.6197	7.8	October 17 Lake, Curtis, mm
2351	(5 fruit) 10-18	1.6218	6.7	Lake, Curtis, bay
2463	(5 fruit) 10-18	1.6213	6.8	Lake, Kp
3139	(6 fruit) 10-18	1.6194	8.0	Lake, N & Co
2564	(5 fruit) 10-18	1.6218	6.4	Lake, Hardy
2635	(5 fruit) 10-19	1.6223	6.1	Lake, Robinson
2951	(6 fruit) 10-19	1.6225	6.0	Lake, B & L
2982	(6 fruit) 10-19	1.6206	7.2	Lake, Allaby jun
2624	(5 fruit) 10-19	1.6209	7.0	Lake, Davis
3148	(6 fruit) 10-19	1.6205	7.2	Lake, Hopkins
2825	(5 fruit) 10-19	1.6214	6.7	October 20. Lake, Winnebago
3049	(6 fruit) 10-19	1.6216	6.6	Lake, Hardy jun
3437	(6 fruit) 10-19	1.6211	6.9	Lake, Hardy, M
2481	(5 fruit) 10-19	1.6209	7.0	Lake, McBride

Weight	Date	R.I.	% Oil	October 21
34 (3 feet)	10-19	1.6189	83	Lake, Woodland
35 (3 feet)	10-19	1.6206	72	Lake, Copland
32	10-20	1.6217	6.5	Lake, Chandler 4
97	10-20	1.6199	76	Hickory, Chandler
30	10-20	1.6195	79	Hickory, N.E.K.
61 (3 feet)	10-21	1.6232	57	Lake, Lowe
329	10-20	1.6209	70	Lake, Mc Millan
311	10-20	1.6215	6.4	Camp, Camp
88	10-20	1.6221	6.3	Lake, Chandler 3
22	10-21	1.6204	73	Lake, Chandler 1
149 (3 feet)	10-22	1.6204	73	October 22 Lake, J. Cooper 1
99 (3 feet)	10-22	1.6238	57	Lake, J. Cooper 2
351 (3 feet)	10-22	1.6209	70	October 23 Lake, J. Cooper 3
149 (3 feet)	10-22	1.6229	58	Lake, J. Cooper 4
139 (3 feet)	10-22	1.6195	79	Lake, J. Cooper 5
95 (3 feet)	10-22	1.6211	69	Lake, J. Cooper 6
177	10-25	1.6205	72	October 25 Lake, Rowe 1 p
33	10-25	1.6211	69	Lake, Chamberlain 2 p

Weight	Date	R.I.	% Oil	October 25
6223	10-25	1.6199	7.8	Lulu, Poppy, Guy
5207	10-25	1.6185	8.4	October 26 Lil, Lulu, Guy
5523	10-25	1.6219	6.4	Lulu, Light, Guy
1328	(5 fruit) 10-26	1.6208	7.1	October 27 Carol, Guy
2047	(5 fruit) 10-27	1.6188	8.4	Watson, Carol
2693	(5 fruit) 10-27	1.6170	9.6	Watson, Claude Carol
2651	(5 fruit) 10-27	1.6233	5.5	Lulu, Claude Guy
2763	(5 fruit) 10-27	1.6210	6.9	Lulu, Claude Vance
2737	(5 fruit) 10-27	1.6234	6.1	October 28 Lulu, Vance
2768	(5 fruit) 10-27	1.6198	7.7	Lulu, Jesse
2670	(5 fruit) 10-27	1.6196	7.8	Lulu, Claude Vance
2617	(5 fruit) 10-27	1.6195	7.9	Lulu, McMillan
2562	(5 fruit) 10-27	1.6208	7.1	Lulu, Wooster
3158	(5 fruit) 10-27	1.6176	9.2	Lulu, Ray Lewis
2746	(5 fruit) 10-27	1.6203	7.4	Lulu, D. Miller
2779	(5 fruit) 10-27	1.6196	7.8	Lulu, Guy
2910	(5 fruit) 10-27	1.6203	7.4	Lulu D.A. Carl Guy

Weight	Date	R. I.	% Bk	October 29
1802	10-28	1.6191	8.2	Hen, Home
1139	10-29	1.6197	8.7 8.0	Lulu, Home Mayfair
1303	10-29	1.6193	5.5 5.7	Lulu, Home Mayfair
2573 (5 feed)	10-28	1.6195	9.0	Lulu, Mayfair
2051 (5 feed)	10-28	1.6192	8.1	Lulu, Lillie
1978 (5 feed)	10-28	1.6182	8.8	Lulu, Pauline, Home
1366 (6 feed)	10-28	1.6200	7.6	Lulu, W.S. Higgins
1620 (6 feed)	10-28	1.6221	6.3	Blakeman, Lillie
1719 (5 feed)	10-28	1.6192	8.1	Blair, Aloday
1735	11-1	1.6224	6.1	November, 1924 Hall Flag
1299	11-1	1.6199	7.6	Lulu, Flag
1096	11-1	1.6182	8.8	Brad I, Flag
1312	11-1	1.6201	7.5	Taylor, Flag
1261		1.6199	7.6	
1462	11-1	1.6194	8.0	November 2 Brad 4, Brooks
1375		1.6193	8.0	
1501 (9 feed)		1.6220	6.3	Lulu, Jones Field Kimball
1910 (8 feed)		1.6207	6.1	Brad 7 (8) Jones Field Kimball
1233	11-1	1.6200	7.6	Lulu, Brooks
1241		1.6220	6.3	

Weight	Date	K⁺	% Ext	November 2
2539 (3 funct.)	11-1	1.6201	7.1	Lake, Ky
2778 (3 funct.)	11-1	1.6221	5.7	Ovett, Ky
6114	11-1	1.6185	8.6	Beaty, Clay
4239		1.6193	8.0	
8417 (9 funct.)	11-1	1.6221	6.3	Hall, Klam
6593 (9 funct.)		1.6221	6.3	11-3
4991	11-1	1.6219	6.4	November 3 Lake, Kimble
3571		1.6226	6.0	
3988	11-1	1.6234	5.6	Lloyd, Kimble
2765		1.6230	5.7	
4053	11-1	1.6198	7.7	Taylor, Klam
3277		1.6208	7.1	11-4
5571	11-1	1.6199	7.6	November 4 Heath, Clay
3638		1.6209	7.0	
6038	11-4	1.6205	7.2	Lake, Brooks
4726	11-4	1.6198	7.7	Lake, Knox
5130	11-4	1.6280	7.6	Lake, Knox
2389 (3 funct.)	11-4	1.6216	6.6	Lake, Knox
2789 (3 funct.)	11-4	1.6281	5.7	Lake, NEW Knox
2383 (3 funct.)	11-4	1.6190	8.3	November 5 Lake, Knox
2351 (3 funct.)	11-4	1.6217	6.5	Lake, Knox

Weight	Date	PS	% Ort	November 5
2689 (5 point)	11-4	1.6197	78	Lake, Jensen
2376 (5 point)	11-4	1.6198	77	Lake, McMillan
2935 (5 point)	11-8	1.6166	98	November 8, 1954 Lions, Cyclone League
2691 (5 point)	11-8	1.6205	71	Lions, Cyclone
5735	11-8	1.6195	79	Lake, Sunland
3852	11-8	1.6191	82	Lake, Patten
5566	11-8	1.6187	84	Lake, Pepsi
5363	11-8	1.6205	72	November 9, 1954 Lake, Brooks
4247		1.6215	67	
4179	11-8	1.6202	74	Taylor, Bronte
3274		1.6203	74	
6040	11-8	1.6209	7	Lake, Kendall
4790		1.6218	64	
5939	11-8	1.6183	87	Coach 78, Winter
9591		1.6180	89	
4195	11-8	1.6181	85	Taylor, Rainey
3420		1.6184	86	
5414	11-9	1.6201	75	Lake, Brandon
4952 (4 point)	11-8	1.6198	77	November 10 Coach ?, Kendall
3222 (4 point)	11-8			Coach ?, Lake Lake Creek

Weight	Date	K.J	% Oil	Remarks
5965 (8 found)	11-9	1.6211	6.9	Good? Cock
6530 (10 found)	11-9	1.6210	6.9	Good? Cock
3391 (5 found)	11-9	1.6190	8.2	Medium? Hen
5624	11-8	1.6170	9.6	Good? Hen
4016 (6 found)		1.6169	9.6	
4648 (8 found)	11-8	1.6182	8.8	Good? Hen
4233		1.6191	8.2	
3065	11-8	1.6212	6.8	Small Hen
1204 (2 found)	11-10	1.6179	9.6	Young Cock? Small Hen
356	11-10	1.6171	9.5	Young Hen
2253 (6 found)	11-12	1.6205	7.2	Good? Cock
2990 (5 found)	11-12	1.6202	7.4	Good? Cock
3436 (5 found)	11-12	1.6172	9.6	Good? Hen
2356 (3 found)	11-12	1.6194	7.8	Good Hen
3130 (4 found)	11-12	1.6181	9.4	Good? Hen
3047 (4 found)	11-12	1.62—	9.4	Good? Hen
4479 (8 found)	11-12	1.6186	8.5	Small Cock
4362 (6 found)		1.6178	8.7	Small Hen
5223	11-15	1.6181	8.8	Young Cock? Hen
4087		1.6191	10.2	

Weight	Date		S.G.	% Oil	
4944	11-13		1.6221	6.3	November 15 Beech 7, Bl 9
4139			1.6215	6.7	
543	11-15		1.6167	9.5	November 16 Beech 7, Blaney
[illegible]			1.6172	9.5	
360	11-15		1.6165	9.7	Beech 1, Flag
4608			1.6177	9.1	
6442	11-15		1.6215	6.6	Hall, Flag
5340	11-15		1.6205	7.2	Lula, Brooks
4704			1.6208	7.6	
5506	11-15		1.6201	7.5	Lula, Hooker
4565			1.6216	6.6	
4201	11-15		1.6180	8.9	November 17 Taylor, Blaney
3233			1.6181	8.8	
2689	(7 fruit)	11-15	1.6181	8.8	Taylor, Bonta
3089	(9 fruit)	11-16	1.6206	7.2	Beech 5, FEC
3946	(8 fruit)		1.6199	7.6	Beech 7, Hatch
4436	(8 fruit)		1.6175	9.2	Camp, Camp
2896	(5 fruit)	11-17	1.6190	8.3	November 18 Lula, McMillen
3712	5 fruit)	11-17	1.6177	9.1	Black weight Blue
6259	(10 fruit)	11-18	1.6170	9.6	Lula, Tinnel, Wade
5444	(4 fruit)	11-18	1.6178	9.0	Lula, Tinnel, Wade

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Weight	Date	R.I.	%Oil	November 9, 1917
2746 (5 feet)	11-18	1.6151	8.8	Lula, King, Hester
2581 (5 feet)	11-17	1.6189	8.3	Lula, Chandler, Hansen
2696 (5 feet)	11-17	1.6215	6.7	Lula, Chandler, Sh
1996 (4 feet)	11-17	1.6182	8.8	Taylor, Chandler, Sh
3231 (6 feet)	11-17	1.6171	9.5	Boyd 7, Cox
2603 (5 feet)	11-17	1.6182	8.8	Lula, Chandler, Peter
2111 (5 feet)	11-17	1.6175	9.2	Lula, Jones
2839 (5 feet)	11-17	1.6163	10.0	November 19 Boyd 3, Jones
3908	11-29	1.6235	5.4	November 21 Boyd 7, Anderson
3016		1.6225	6.0	
3415	11-29	1.6234	5.5	November 3: Hall, Hankerson
4449		1.6234	5.5	
4311	11-29	1.6172	9.4	Taylor, Rhody
3437		1.6173	9.4	
5237	11-29	.6192	8.1	Lula, Brown
4134		1.6192	8.1	
5717	11-29	1.6192	8.0	Lula, Kendall
4279		1.6211	6.9	
4754	11-29	1.6178	9.0	Boyd 7, Rhody
4105		1.6180	8.9	

Weight	Date	RC	Hb	December 1, 1954
6498	11-29	1.6168	9.7	Bowl 1, Klug
4922		1.6170	9.6	
6539	11-29	1.6169	9.6	Bowl 3, Klug
5285		1.6171	9.5	
				December 6, 1954
5947	12-6	1.6158	8.4	Lula, Brooks
4103		1.6195	7.7	
5199	12-6	1.6155	10.2	Bowl 7, Kleasy
3756		1.6162	10.1	
				December 7
6112	12-6	1.6223	6.1	Nall, Nankerville
4817		1.6229	5.8	
4332	12-6	1.6231	8.7	Bowl 7, Nankerville
3146		1.6242	8.0	
5671	12-6	1.6179	9.0	Lula, Kendall
4653		1.6190	8.3	
				December 13
4594	12-13	1.6142	11.5	Lula, Kleasy
2356	12-13	1.6198	8.4	Wagner, SES.
1782		1.6196	7.7	
				December 14
4753	12-13	1.6160	10.2	Taylor, Kleasy
3942		1.6165	9.9	
5223	12-13	1.6153	10.7	Bowl 1, Kleasy
3772		1.6139	11.7	
4925	12-13	1.6151	10.9	Bowl 7, Kleasy
3762		1.6137	10.3	

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Weight	Date	R. I.	% Oil	
				December 14
5303	12-14	1.6192	8.1	Lula, Harkness
4430		1.6208	7.1	
6327	12-14	1.6150	11.0	Lula, Block 9
4686		1.6167	9.5	
				December 15
5930	12-14	1.6179	9.0	Lula, Block 5
4380		1.6193	8.0	
6205	12-13	1.6199	7.6	Lula, Brooks
3961		1.6189	8.3	
5514	12-13	1.6186	8.5	Lula, Kendall
4430		1.6199	7.6	
4496	12-12	1.6211	6.9	Nabal, SES
3382		1.6206	7.2	
				December 28
5559	12-27	1.6188	8.4	Lula Brooks
4106		1.6193	8.0	
6203	12-27	1.6182	8.8	Lula, Kendall
4902		1.6178	9.0	
5191	12-27	1.6202	7.-	Nabal, S.E.S
3187		1.6201	7.5	
2088 (Effluent)	12-27	1.6164	10.0	Wagner, SES
1548 (Effluent)		1.6182	8.7	
				January 10 '55
3843	1-10	1.6135	12.0	Wagner, S.E.S.
2143		1.6160	10.2	
6817	1-10	1.6219	6.4	Lindy, S.E.S.

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Weight 4/59	Date 1-10-55	R.I. 1.6205	% Oil 7.2	January 10, 1955 Nabel, I.F.L.
5891	1-10	1.6123	12.9	January 11, 1955 Lula, Clarke
4361		1.6122	12.9	

✓ Oil Tests 1955

578	5-2	1.6067	16.3	May 3, 1955 Frazier
470	5-2	1.6072	16.5	Frazier
2430 (5 fruit)	10-17	1.6230	Hetsman 1.6345 1	October November 17, 1955 Lula, Prouty
2926 (5 fruit)	10-17	1.6217	1	Lula, McBride
1943 (4 fruit)	10-17	1.6240		Lula, Higgins Lab
1956 (4 fruit)	10-17	1.6249	1	Lula, Higgins, N.
3181 (5 fruit)	10-20	1.6208 17	Hetsman 1.6318 1	October 20, 1955 Lula, Prouty
2965 (7 fruit)	10-21	1.6228 17	1	October 21, 1955 Frazier Hay (Hetsman)
3750 (5 fruit)	10-21	1.6205 .0017	Hetsman 1.6343	October 21, 1955 Lula, McBride
2640 (5 fruit)	10-21	1.6199 .0017		Lula, Prouty 2
2851 (5 fruit)	10-17	1.6198 .0017	7.0 1	Lula, Prouty 1
2911 (5 fruit)	10-25	1.6237 12	1.6302 3	October 25 Lula, Campbell
4956 (5 fruit)	10-25	1.6218 16	1	Lula, Rowe

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Oil Tests for 1955

Weight	Date	R. D.		% Oil	
5424 (1)	10-26	1.6206			Lula, McBride
4666 (1)	10-26	1.6223			Lula, Grove
4671 (1)	10-26	1.6221			Lula, Bond 7, Ellis
8350 (1)	10-26	1.6233			Lula, Bond 7, Ellis
4034 (1)	10-27	1.6271			Monroe, Rice
2980 (1)	10-28	1.6212			Lula, Cook
2709 (1)	10-28	1.6212			Lula, Prouty
2789 (1)	10-28	1.6218			Lula, McBride
3018 (1)	10-28	1.6233			Lathrop, Nunn
2819 (1)	10-28	1.6220			Lathrop, Ida Bentley
3634 (1)	10-31	1.6212			October 31 Lula, McBride
2979 (1)	10-31	1.6205			Lula, Prouty
2885 (1)	10-31	1.6227			November 1 Lula, Kennedy
4996 (1)	10-31	1.6240			Lula, Miller
3493 (1)	11-2	1.6229			November 2 Bond 7, Jordan
3085 (1)	11-2	1.6221			Lula, Dunn
3710 (1)	11-2	1.6207			Lula, McBride

1955

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Weight		Date	RV		% Oil	November 3, 1955
6422	(4)	11-2	1.6215	Holoway 1.6202		Lula, Th. Trapped #1
3175	(6)	11-2	1.6219		13	Lula, Th. Trap #2
3038	(5)	11-3	1.6193		9.1	Lula, Peaceaty
3845	(5)	11-3	1.6221		7.2	Lula Lauenburg
3089	(5)	11-3	1.6215		7.6	Lula, Kap
						November 4, 1955
2659	(6)	11-3	1.6196	Holoway 1.6202	8.9	Lula, McBride
2495	(3)	11-3	1.6237		6.9	Lula, Loveland
2872	(6)	11-3	1.6219		7.4	Lula, Flag #2
2521	(5)	11-3	1.6194		9.0	Lula, Flag #3
2361	(5)	11-3	1.6222		7.2	Lula, Flag #1
						November 7
2090	(6)	11-7	1.6195	Holoway 1.6202	8.8	Lula Flag 3
2607	(5)	11-7	1.6239		6.1	Lula Flag 1
2693	(3)	11-7	1.6205		8.1	Lula, Flag 2
3401	(3)	11-1	1.6210		8.0	Lula, Flag 4
3427	(7)	11-7	1.6229		6.8	Board 7, Kendall
2436	(7)	11-7	1.6247		5.7	Board 8, Kendall
1930	(5)	11-7	1.6222		7.2	Hakesa, Kendall
						November 8
2137	(5)	11-8	.6246		5.7	Lula Flag #1
2521	(5)	11-8	1.6223		7.2	Lula Flag #2
2854	(6)	11-8	1.6209		8.0	Lula, Th. Trap
2490	(6)	11-8	1.6218		7.4	Board 7, Cox
2491	(5)	11-8	1.6230		6.7	Lula Flag #3
2717	(5)	11-8	1.6241		6.0	Lula Flag #4
3134	(5)	11-8	1.6239		6.1	Lula, Flag #5
3010	(6)	11-8	1.6243		5.9	Board 8 Th. Trap
						November 9
2929	(10)	11-8	1.6229		6.8	Board 9 Th. Trap #2
3121	(6)	11-8	1.6221		7.2	Lula, Ebsary
3000	(9)	11-8	1.6209		8.3	Board 7, Kinney

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Oil. Tests for 1955

Weight	Date	N.D.		% Oil	November 9, 55:
1784 (5 feet)	11-9	1.6229	1.6231	6.8	Nielsen Hay
2663 (5)	11-9	1.6210		8.0	Lula, English
2909 (5)	11-9	1.6230		6.7	Lula, Vonada
2562 (5)	11-9	1.6198		8.8	Lula, Smith
2613 (5)	11-9	1.6208		8.1	Lula, Hay Lands
					November 10
2977 (5)	11-10	1.6222	1.6223	7.2	Lula, Hay Shed
2529 (5)	11-10	1.6183		9.8	Lula, Shed
2218 (5)	11-10 or 7	1.6185		11.7	Lula - Ranch Hill
2458 (5)	11-10	1.6219		7.4	Nielsen Hay
1665 (5)	11-10	1.6245		5.5	Lula, Hay
					November 11
2684 (5)		1.6197	1.6200	8.8	Lula, Hay 1
3146 (6)	11-10	1.6229		6.8	Board 3, Camp
2902 (5)	11-14	1.6211		7.9	Lula, Simmons
3192 (5)	11-14	1.6214		7.7	Lula, Olson
2976 (5)		1.6210		8.0	Lula, Hay 2
2960 (5)		1.6168		10.8	Lula, Hay 3
2186 (5)		1.6224		7.1	Lula, Hay 4
2701 (5)		1.6183		9.7	Lula, Hay 5
					November 8
2879 (5)	11-14	1.6232	1.6232	6.6	Lula, Steinberg
2574 (5)	11-14	1.6214		7.7	Lula, Hay 6
2783 (5)	11-14	1.6206		8.3	Lula, Hay 7
2771 (5)	11-14	1.6219		7.4	Board 7 Hay
2679 (5)	11-14	1.6205		8.3	Lula, Hay 8
					November 15
3152 (6)	11-15	1.6218	1.6212	7.4	Lula, Hay 1
3529 (6)	11-15	1.6235		6.4	Lula "
518 (5)	11-15	1.6211		7.9	Lula "
3354 (6)	11-15	1.6208		8.1	Lula Hay -
409 (5)	11-15	1.6236		6.3	Lula
442 (5)	11-15	1.6227		7.5	Lula
2406 (5)	11-15	1.6279		3.7	Blackmon Hay

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Weight	Sieve	R.I.		% Oil	
2385 (5)	10-8	1.0288		7.2	December 9, 1955 Booth 7, Flag
6328 (10)	10-29	1.6168	Melrose 1.6162	10.8	December 29 Lula, Cook
379	"	1.6180		10.0	"
488	"	1.6157		11.6	"
306 (1)	1-3	1.6180		12.8	January 3 1956 Taylor, Flag
2868 (9)	1-3	1.6166		11.0	"
394 (1)	1-3	1.6173		10.4	"
4696 (10)	1-5	1.6196	Melrose 1.6182	8.9	January 6 Booth 8, Bl. 1

Oil Dist, 1956

3326 (6)	#1 10-29	1.6233	Melrose 1.6242	6.6	October 29 1956 Lula, Cooper
3419 (6)	#2 "	1.6225		7.0	Lula, Greene
3116 (6)	#3 "	1.6252		5.4	Booth 7 N. Co.
1947 (6)	#3 "	1.6253		5.4	Booth 8, N Co.
3268 (6)	#4 "	1.6243		5.9	Booth 7, Jones
3199 (6)	#4 "	1.6247		5.7	October 30 Lula, Jones
3231 (6)	#5 "	1.6242		6.0	Lula, McMillan
2820 (4)	#5 "	1.6259		4.9	Booth 7 Taylor
2370 (4)	"	1.6247		5.7	Lula Pinnaty
2690 (6)	"	1.6246		5.7	Lula McBride

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5184 (12)	11-5	1.6247	5.1	November 5, 1956 Brazil T. Bl L.
5515 (12)	11-5	1.6233	6.5	Lula, Bl L.
5703 (12)	11-5	1.6225	7.0	Lula, H. L. Cox
2794 (6)	11-5	1.6235	6.4	November 5, 1956 Lula, Doerman
2779 (6)	11-5	1.6254	5.2	Lula, Cooper
2903 (6)	11-5	1.6230	6.7	Lula, Jeron
2921 (6)	11-5	1.6230	6.7	November 6 Lula, McMillen
5973 (12)	10-30	1.6190	9.3	Pope, Pope
5896 (6)	11-6	1.6228	6.8	Lula, Spafford
3160 (6)	11-6	1.6203	8.4	Lula, Dunn
5573 (6)	11-8	1.6240	6.1	November 10 Lula, McIntyre
5704 (6)	11-12	1.6229	6.8	November 12 Lula, Peavey
5553 (6)	11-12	1.6224	7.1	Lula, McBride
5791 (12)	11-12	1.6214	7.7	Lula, Brand, W.L Cox
5344 (12)	11-12	1.6221	7.2	Lula, Brand, N. Sod
5316 (12)	11-12	1.6219	7.4	Lula, Brand, S. Sod
5511 (6)	11-9	1.6205	5.3	November 13 Lula, Engleman

2932	(6)	11-9	1.6220	7.3	November 13 Lake, Mc Millan
3119	(6)	11-9	1.6208	8.1	Lake, Green
2772	(6)	11-9	1.6202	8.5	Lake, Pope
2799	(6)	11-9	1.6224	7.1	Bond 7 Pope
3414	(10)	11-12	1.6224	7.1	Vacc, Krome
4039	(10)	11-12	1.6267	4.4	Bond 7 Krome
3242	(6)	11-13	1.6209	8.0	Lake, Cook
2064	(6)	11-13	1.6224	7.1	Bond 8 Cook
2883	(6)	11-13	1.6209	8.0	November 14 Nickson, Cook
3010	(6)	11-13	1.6203	8.6	Lake, Gr A
2900	(6)	11-13	1.6225	7.1	Bond 8 Gr A
2937	(6)	11-13	1.6230	6.1	Nickson, Gr A
2610	(6)	11-13	1.6222	7.2	Lake, 120 Gr. Pine Island
2571	(6)	11-13	1.6223	7.1	Bond 8 120
2586	(6)	11-14	1.6225	6.8	Lake Mc Trap
2671	(6)	11-14	1.6203	8.4	Lake, Bird
2318	(6)	11-13	1.6216	7.6	Nickson 120
3126	(6)	11-13	1.6215	7.6	Bond 7 Rhea
2643	(6)	11-13	1.6218	7.4	Lake, Green

2455	(6)	11-12	1.6231	6.7	Lake, Higgins
2691	(6)	11-13	1.6235	6.6	Lake, Cooper
2516	(6)	11-14	1.6207	8.3	Lake, Sta. Hwy #2 (November 15 1956)
2974	(6)	11-14	1.6216	7.6	Lake, Sta. Hwy #3
4126	(8)	11-14	1.6216	7.6	Lake, Channel Island #4 Sta
3324	(7)	11-14	1.6208	8.1	Lake, Channel Center
3112	(7)	11-14	1.6207	8.2	Lake, Channel East
3767	(8)	11-14	1.6208	8.1	Lake, Channel #1 Buoy
2351	(6)	11-14	1.6218	7.4	Lake, Hwy #1
2696	(6)	11-14	1.6229	6.5	Lake, Hwy. #2
3710	(6)	11-14	1.6215	7.6	Lake, Hwy #3
2341	(6)	11-15	1.6215	7.6	Lake, Light
3026	(8)	11-15	1.6219	7.4	Lake, Higgins #3
2587	(6)	11-15	1.6228	6.5	Lake, Hwy #6
2859	(6)	11-14	1.6244	5.8	Lake, Hwy #5 (November 16, 1956)
2593	(6)	11-14	1.6201	8.6	Lake, Hwy #4
1703	(6)	11-15	1.6235	6.6	Hall, Hwy
3137	(6)	11-14	1.6231	6.6	Lake, Essig
2926	(6)	11-15	1.6209	8.0	Lake, Miller

2654	(6)	11-15	1.6229	6.8	Lula, Spaffor
2756	(6)	11-15	1.6209	8.0	Lula, Glenn
3137	(6)	11-15	1.6205	8.1	Lula, Vanda
3106	(6)	11-16	1.6199	8.7	November 9, 19 Lula, Jacob
3963	(9)	11-18	1.6209	8.0	Lula, Glenn
2529	(6)	11-18	1.6212	7.8	Lula, Glenn
2816	(6)	11-18	1.6228	6.8	Hudson, Wm
2496	(6)	11-18	1.6226	6.9	Lula, Wagg
3078	(7)	11-19	1.6212	7.8	November Lula, Lee
2815	(6)	11-19	1.6208	8.1	Lula, B. F.
3126	(7)	11-19	1.6211	7.9	Lula, B. F.
3071	(6)	11-19	1.6180	10.0	Lula, Peterson
5036	(12)	11-15	———		November 20 Lula, Lee Ford
4975	(12)	11-16	1.6228	6.8	Lula, Lula Ho
3060	(6)	11-19	1.6221	7.2	Brock & Lee
2583	(6)	11-19	1.6221	7.2	Lula, Hog
2617	(6)	11-19	1.6240	8.6	Lula, Hog
2767	(6)	11-19	1.6232	6.6	Lula, Hog
2375	(6)	11-19	1.6228	6.8	Lula, Hog

1068	(7)	11-20	1.6241	6.0	Lula, Higgins, Tex
1664	(6)	11-19	1.6219	7.4	November 21 Lula, Kendall #1
1735	(6)	11-21	1.6239	6.1	Lula, Kendall, Fitz Tex
2069	(6)	11-21	1.6203	5.4	Hartman, Geo. D.
2378	(6)	11-21	1.6237	6.3	Herman, Geo. D.
1735	(6)	11-21	1.6235	6.4	Lula, Kendall Fitz
1733	(6)	11/19	1.6216	7.6	Lula, Kendall #3 Miller
1962	(6)	11/20	1.6199	8.7	Lula, Cox
2265	(8)	11/20	1.6196	5.9	Lula, Higgins Unit Gilbert
1905	(7)	11/20	1.6179	10.0	Lula, Higgins Pilot
2485	(6)	11/19	1.6180	10.1	Lula, Cook
1661	(6)	11/19	1.6201	8.6	Lula, Seelects
2036	(12)	11/15	1.6211	7.8	Lula, Avon Park
1809	(6)	11/20	1.6198	8.8	Lula, Warwick
1997	(6)	11/20	1.6218	7.4	November 23 Lula, J. F. Sec.
1752	(6)	11/21	1.6232	6.6	Lula, Jeron
1584	(6)	11/21	1.6234	7.7	Lula, Sagebrush
1859	(6)	11/26	1.6210	8.0	November 26 Lula, Mefield
2110	(6)	11/26	1.6215	7.6	Lula, H. Epmore

2786	(6)	11-26	1.6208	8.1	Lula 55B #1
2998	(6)	11-24	1.6222	7.2	Lula, Flo Trap #3
2521	(6)	11-25	1.6235	6.4	Lula, Flo. Trap #1
2489	(6)	11-25	1.6233	6.5	Lula, Flo. Trap #2
2762	(6)	11-26	1.6240	6.1	Lula, Flag #1
3166	(6)	11-26	1.6205	7.6	Lula, Flag #2
3231	(6)	11-26	1.6217	7.5	Lula, Flag #3
2856	(6)	11-26	1.6216	7.6	Lula Flag #4
2303	(6)	11-26	1.6219	7.4	Lula, Flag #5
3100	(6)	11-26	1.6220	7.3	Board #, Lu
3633	(6)	11-26	1.6186	9.6	Board #, Lu
3186	(6)	11-26	1.6200	8.6	Board #, Lu
2751	(6)	11-26	1.6240	6.1	November 21 Lula Long
2727	(6)	11-26	1.6196	9.0	Lula, Mitten
3113	(6)	11-26	1.6183	9.8	Lula, Mallard Pond
2826	(6)	11-27	1.6214	7.7	Lula, J Mine
2199	(6)	11-27	1.6223	7.1	Jackson, J Mine
2591	(6)	11-27	1.6208	8.1	Tucker, Lula
2766	(6)	11-27	1.6212	7.8	Lula, Tucker

1812	(6)	11-27	1.6255	5.2	Bord 2, Linden
2957	(6)	11-27	1.6198	8.8	Bord 3, Linden
3262	(6)	11-27	1.6178	10.1	Bord 1, Linden
2240	(6)	11-27	1.6209	8.0	Taylor, G.M Fed.
1897	(6)	11-27	1.6230	6.7	Bord 2, G.M Fed.
2713	(6)	11-26	1.6187	9.5	Bord 3 Cox
2344	(6)	11-27	1.6229	6.8	Lulo, Flag #1
2975	(7)	11-27	1.6211	7.9	Lulo, Flag #2
2774	(10)	11-27	1.6233	6.5	Lulo, Hankness
2990	(7)	11-27	1.6241	6.0	November 25 Lulo, Flo Imp #1
2991	(6)	11-27	1.6214	7.7	Lulo, Flo Imp #2
2983	(7)	11-27	1.6235	6.6	Taylor Flo Imp #3
2932	(6)	11-27	1.6212	7.1	Taylor Flo Imp #4
3552	(6)	11-27	1.6163	9.8	Lulo, J.F. Inc
3533	(6)	11-27	1.6181	9.9	Bord 1, J.F. Inc
2659	(6)	11-28	1.6219	7.4	Lulo, Linenberg
3099	(6)	11-28	1.6221	7.2	Bord 3 J.E.C.
3019	(6)	11-28	1.6203	8.4	Bord 1, Rivers
3459	(6)	11-28	1.6189	9.2	Bord 3, Kendall

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3296	(6)	11-25	1.6189	7.4	Brook, Camp
2799	(6)	11-25	1.6223	7.1	Sula, Mt Miller
3492	(6)	11-25	1.6230	6.7	Brook, Fla. Cay
3108	(6)	11-28	1.6244	5.8	Sula, Camp
2381	(6)	11-28	1.6207	8.2	Taylor Camp
2745	(7)	11-28	1.6225	6.8	Sula, W Pt Mills
2733	(6)	11-29	1.6227	6.9	November 29 Sula, Fly 1
2453	(6)	11-29	1.6221	7.2	Sula, Fly 2
2838	(6)	11-29	1.6209	8.0	Sula, Fly 3
2556	(6)	11-29	1.6220	7.3	Sula, Fly 4
2465	(6)	11-29	1.6211	7.9	Sula, Cr
3179	(6)	11-29	1.6198	8.8	Brook, Cr
2737	(6)	11-26-27	1.6199	8.7	Sula, Mg Key Submerged
2668	(6)	11-26-27	1.6221	7.2	Sula, S.N. Key Barra Reef
2640	(6)	11-26-27	1.6232	6.6	Sula, Nelson
2818	(6)	12-3	1.6219	7.4	December 3 Sula, Fla. Cay 3
3243	(5)	12-3	1.6215	7.6	Sula, Fla. Cay 3
3284	(6)	11-30	1.6190	9.3	Brook II, Cr
2935	(6)	11-30	1.6182	9.5	Brook I, Elbow Reef

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2948	(6)	11.3	1.6197	8.8	Board, F.C. Hook
2609	(6)	12.3	1.6209	8.0	Lula, Flag #1
2796	(6)	12.3	1.6212	7.8	Lula, Flag #2
3078	(7)	12.3	1.6221	7.2	Lula, Herman
2271	(6)	12.3	1.6220	7.3	Lula, Campbell
3430	(10)	12.3	1.6228	6.8	Lula, Stafford
2230	(6)	12.3	1.6228	6.8	Lula, Flag #3
2909	(6)	12.3	1.6199	8.7	Lula, Flag #4
2137	(6)	12.3	1.6205	8.3	Lula, Luciene
2303	(6)	12.3	1.6207	8.2	December 4 Taylor, Fla. Flag #2
2651	(6)	12.4	1.6215	7.6	Board 3 F.C. Cummings
2543	(6)	12.4	.6188	9.4	Lula, Blair
2544	(6)	12.4	1.620-	8.3	Board 3, Hoosman
2544	(6)	12.4	1.6215	7.6	Board 3, Graham
1963	(6)	12.4	1.6213	7.8	Hickson, Cooper
2193	(6)	12.4	1.6214	7.7	Lula, Essig
2615	(6)	12.4	1.6219	7.4	Lula, McMillen
2532	(6)	12.4	1.6218	7.4	Lula, Hankness
3295	(6)	12.4	1.6187	9.0	Board 3, Hankness

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2376	(6)	12-4	1.6193	9.1	Lala, Flag #1
3123	(6)	12-4	1.6202	8.5	Lala, Flag #2
3060	(6)	12-4	1.6202	8.5	Lala, Flag #3
2439	(6)	12-4	1.6230	6.7	Lala, Flag #4
2896	(6)	12-4	1.6180	10.0	Board, Heggie (Shoulder)
2956	(7)	12-4	1.6190	9.3	Board, Heggie (found December 5)
2648	(6)	12-4	1.6204	8.4	Lala, Light
2442	(6)	12-5	1.6194	9.0	Lala, Kendall #6
2899	(6)	12-5	1.6192	9.2	Lala, Kendall #5
2954	(6)	12-4	1.6210	8.0	Lala, Heggie (Pina)
2815	(6)	12-4	1.6218	7.4	Lala, Raven
3075	(6)	12-4	1.6200	8.6	Board, Raven
2795	(6)	12-4	1.6218	7.4	Lala, Flag #5
2347	(6)	12-5	1.6256	5.1	Board, Kendall #9
2106	(6)	12-5	1.6224	7.1	Board, Kendall #8 (Home)
1994	(6)	12-5	1.6258	6.0	Board, Kendall #9
2851	(6)	12-4	1.6222	7.2	Lala, Flag #6
2769	(6)	12-5	1.6240	5.6	Lala, Flag #7
2985	(6)	12-4	1.6209	8.0	Board, Lee

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2831	(6)	12.5	1.6213	7.8	Lula, Kendall #1
2803	(6)	12.5	1.6230	6.7	Lula, Kendall #2
2739	(6)	12.5	1.6191	4.2	Lula, Kendall #3
2818	(6)	12.5	1.6200	8.6	Lula, Kendall #4
2677	(6)	12.5	1.6224	7.1	Lula, Coy #2 F.C.C. Stage December 6
2793	(6)	12.5	1.6177	10.2	Brock 1, F.C.C. Stake
2266	(6)	12.5	1.6198	8.8	Lula, F.C.C. Barber
2163	(6)	12.5	1.6202	8.5	Brock 1, F.C.C. Barber
2728	(6)	12.6	1.6205	8.3	Lula, Flag
2189	(6)	12.5	1.6158	11.5	Vaca, Krome
2718	(6)	12.5	1.6162	11.2	Lula, Kendall #1
2597	(6)	12.5	1.6216	7.6	Lula, Kendall #3
2579	(6)	12.6	1.6242	6.0	Brock 6, Kendall #6
3004	(6)	12.6	1.6198	8.8	Brock 3, Kendall #5
2880	(6)	12.6	1.6184	9.7	Brock 1, Kendall #7 December 7
2478	(6)	12.6	1.6215	7.6	Lula, Kendall #7
3524	(6)	12.6	1.6230	6.7	Lula, Kendall #6
2247	(6)	12.7	1.6194	9.0	Hayley Kendall #5
2209	(6)	12.7	1.6212	7.5	Nickerson, Kendall #3

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2700	(6)	12-7	Holoway = .6342 1.6232	7.2	Board 3, Kindall #2 Chinn plantation = .6191
			1.6184	α 6.5	
2989	(6)	12-7	1.6178	α 7.2	Lula, Kendall #2
2900	(6)	12-7	1.6175	α 7.4	Board 1, Kindall #4
3215	(6)	12-7	1.6153	α 8.5	Lula, Kindall #8
3200	(6)	12-7	1.6170	α 7.7	Lula, Kindall #9
2535	(6)	12-7	1.6169	α 7.8	Lula, Kindall #10
2977	(6)	12-10	Holoway = 1.6339 1.6175	10.1	December 10 Lula, Lee
3020	(6)	12-10	1.6182	9.6	Board 1, Boazman,
3041	(6)	12-10	1.6158	11.3	Board 1, Buchanan
2633	(6)	12-10	1.6188	9.2	Taylor, Ames
2334	(6)	12-10	1.6209	7.8	Taylor, Higgins, Tom
2721	(6)	12-10	1.6211	7.7	Lula, Higgins Home
2477	(6)	12-10	1.6214	7.5	Herman, Cotton
1904	(6)	12-10	1.6219	7.2	December 11 Lula, Herman
3133	(6)	12-10	1.6211	7.7	Lula, Cotton
2168	(6)	12-10	1.6208	7.9	Lula, Camp
2447	(6)	12-11	1.6204	8.2	Lula, Cobb's Creek
2257	(6)	2-11	1.6207	8.0	Lula, Hartman, Mrs
2428	(6)	2-1	1.6218	7.2	Lula, Hartman, E. [illegible]

2994	(6)	12-12	1.6339 1.6190	9.1	December 12, 1960 Lula, Hunt
3177	(6)	12-12	1.6156	9.3	Board 1, Hunt
2526	(6)	12-11	1.6222	7.0	Board 7, Board
2122	(6)	12-12	1.6225	6.8	Hickson, Kalyn T.C.
3296	(7)	12-12	1.6161	11.1	Board 1, Navarro
3161	(1)	12-11	1.6201	8.4	Lula, Area #1
3303	(7)	12-11	1.6190	9.1	Lula, Area #2
1079	(3)	12-12	1.6199	8.3	Costa Rica T.T. Elmore December 12
4086	(6)	12-13	1.6182	9.6	Board 7 B, Kendall
3486	(6)	12-13	1.6173	10.2	Board 3, Kendall
3363	(4)	12-14	1.6201	8.4	Collinson, Kendall
3478	(6)	12-14	1.6159	11.2	Board 3, C. Lee
2963	(4)	12-14	1.6205	8.1	Herman, Kendall
3182	(6)	12-12	1.6213	7.6	Collinson, PH Kendall
3091	(6)	12-17	α-chloronaphthalene - 1.6296 1.6183	6.8	December 17 Lula, Camp
3091	(6)	12-17	naphthalene - 1.6343 1.6233	6.6	December 18 Lula, Camp
1973	(4)	12-20	1.6175	10.4	December 20 Pope, Pope
	(4)	12-26	1.6138	13.5%	December 27 Pope, Pope
2282	(6)	12-27	1.6232	6.7	Lula, Hankins
2016	(6)	12-27	1.6214	7.8	Hayley, Hankins L 9 12

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3166 (9)	14-28	1.6181	10.0	December 28
2074 (6)	1-4	1.6197	9.9	"
2065 (2)	1-11	1.6202	8.6	January 12
518 (1)	" 11	1.6195	9.0	" "
2234 (8)	1-16	1.6211	8.0	January 16,

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Arcadia

Weight	Determined	R.I.	% Oil	
2107 (4)		1.6245	5.7	Lula, Lessig
1456 (4)		1.6255	5.2	Lula, Lessig
				Oct 8
3258 (6)			5.6	Lula, Hogl
3090 6/		1.6232	6.6	Lula, Hogl 2
				October 14
3126 4/	10/16	1.6254	5.8	Lula, Co 2
2756 4/	"	1.6242	6.9	Lula, Co 1
2942 6/	"	1.6249	5.5	Lula, Co 2
2906 6/	"	1.6250	5.4	Lula, Co 3
3435 6/	10/15	1.6221	7.2	Lula, FR
3199 4/	10/16	1.6233	6.5	Lula, Co 3
2839 4/	"	1.6237	5.3	Lula, Co 4
				October 21
3129 6/	10/21	1.6230	7.2	Lula, Lessig
3122 6/		1.6226	6.9	
				October 24
2760 6/	10/23	1.6220	7.3	Lula, D Corp 1
2819 6/	"	1.6229	6.7	Lula, D Corp 2
2960 6/	"	1.6247	5.6	Lula, D Corp 3
3168 6/	"	1.6246	5.7	Lula, D Corp 4
2896 6/	"	1.6229	6.7	Lula, D Corp 5
2979 6/	"	1.6230	6.7	Lula, D Corp 6
2911 6/	"	1.6218	7.4	Lula, D Corp 7
				October 25
2811 4/	10/25	1.6227	6.8	Lula, Hog 3
2944 4/	10/25	1.6228	6.8	Lula, Hog 2
3363 4/	10/28	1.6249	6.5	Lula, Lessig
2800 5/	10/28	1.6214	7.7	Lula, Lessig
				November 1
2968 6/	10/31	1.6228	6.8	Lula, Kimball 1
3012 6/	10/31	1.6232	6.6	Lula, Kimball 2
2796 6/	10/31	1.6204	8.3	Lula, Kimball 3
3322 4/	10/30	1.6239	6.1	Lula, Co 2 S
2847 4/	10/30	1.6228	6.8	Lula, Co #1
3310 6/	10/30	1.6220	7.3	Lula, Co, SEC
2641 6/	10/30	1.6228	6.8	Lula, Co L
2991 4/	10/30	1.6227	6.8	Lula, Jack Hogl

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Weight	Date		R. I	% Oil	
					11/1/57
2677	4	10/30	1.6210	7.9	Lab, Kendall #1
2972	4	10/30	1.6235	6.3	Lab, Kendall #2
					11/4/57
3409	4	11/4	1.6199	8.7	Lab, Kendall #1
3282	4	11/4	1.6212	7.8	Lab, Kendall #2
3196	4	11/4	1.6192	8.1	Lab, Kendall #3
3018	4	11/4	1.6238	6.2	Lab, Lacerne
					11/5/57
3315	4	11/5	1.6198	8.7	Lab, Kendall #3
3193	4	11/5	1.6214	7.7	Lab, Kendall #2
3089	4	11/5	1.6215	7.6	Lab, Kendall #3
					11/6/57
2594	4	11/6	1.6218	7.4	Lab, Hay #1
2575	4	11/6	1.6225	7.0	Lab, Hay #2
2804	4	11/6	1.6228	6.8	Lab, Hay #3
2772	4	11/6	1.6219	7.2	Lab, Hay #4
3470	4	11/6	1.6194	8.9	Lab, Kendall #1
3597	4	11/6	1.6214	7.5	Lab, Kendall #2
3255	4	11/6	1.6218	7.3	Lab, Kendall #3
					11/8/57
3708	4	11/7	1.6210	7.8	Lab, Kendall #1
3184	4	11/7	1.6193	8.9	#2
3405	4	11/7	1.6195	8.5	#3
3402	4	11/7	1.6195	8.6	#4
3215	4	11/8	1.6190	9.1	#5
2783	4	11/8	1.6204	8.2	#6
2948	4	11/	1.6218	7.3	Lab, Lacerne Hay
					11/12/57
2394	4	11/12	1.6206	8.1	Lab, Kendall #1
3600	4	11/12	1.6205	8.2	Lab, Kendall #2
3405	4	11/12	1.6197	8.7	Lab, Kendall #3
3514	4	11/12	1.6210	7.8	Lab, Kendall #4
3476	4	11/12	1.6210	7.8	Lab, Kendall #5
3323	4	11/12	1.6190	9.1	Lab, Kendall #6
3012	4	11/12	1.6205	8.2	Lab, Hay #1
					11/13/57
2502	4	11/12	1.6197	8.7	Lab, Hay #1
3059	4	11/12	1.6200	8.5	Lab, Hay #2
3216	4	11/12	1.6199	8.5	Lab, Hay #3

Weight	Date Packed	R.I.	% Oil	Nov. 3 1951
2094 G	11/13	1.6245	5.6	Board & Flag #2
2182 G	11/13	1.6221	7.1	Board & Flag #2
2373 G	11/13	1.6225	6.8	Board & Flag #3
G	11/13	1.6226	6.8	Board & Flag #4
				11/14/57
2902 G	11/12	1.6200	8.5	Fula, Flag #1 Loose
2574 G		1.6229	6.6	Fula, Flag #2
2705 G		1.6204	8.2	Fula, Flag #3
2770 G		1.6194	8.9	Fula, Flag #4
3096 G		1.6213	7.6	Fula, Flag #5
				11/18/57
1589 G	11/14?	1.6218	7.3	Board & Kendall
1284 G	11/15	1.6205	8.2	Board & Kendall
1173 G	11/15	1.6225	6.8	Board & Kendall
211 G	11/15	1.6144	11.4	Hess, Kendall
				11/25/57
2995 G	11/25	1.6217	7.2	Fula, Guerra
				11/20/57
8236 G	11/25	1.6199	8.3	Fula, Flag #1
2469 G	11/25	1.6207	7.0	Fula, Flag #2
2093 G	11/25	1.6198	8.6	Fula, Flag #3

1955 Progress Report

- 8 -

1955 Progress Report

Part of the Data Obtained in Avocado Maturity Studies 1951-55

1952 Comparisons of Individual Hass Trees

Selected fruit of uniform size, 10 fruit weighed 9.4-11.8 lbs. (mostly 10.0 to 11.5)

Block 2

Nov. 14								Nov. 19-21							
Row	Tree	Oil													
8	11	8.7	11.8	12.0				1	3	11.5	11.5				
9	11	9.8	12.0	12.1				2	3	11.0					
6	11	8.8	12.2					4	22	12.0					
7	11	9.8						2	22	10.7					
8	11	8.5						1	22	9.8					
								6	14	11.6					
Nov. 19-21								8	14	11.0	11.1	12.1			
9	3	9.6						9	14	12.6	12.1				
6	3	9.7						1	19	12.2					
7	6	10.2						2	19	10.6					
10	6	10.6						3	19	10.9					
6	3	9.6						5	3	10.2					
8	3	10.7	11.9	12.1	12.6			3	4	10.0					
8	22	9.5						10	11	11.2					
9	22	10.0	11.0					7	19	12.1	12.2				
9	19	9.7	11.1	11.6	10.9	13.1		7	3	11.9					
8	19	9.6	12.0					Dec. 17							
10	22	10.0						4	4	10.7					
3	22	9.8						3	4	10.3					
3	3	9.8	11.6	11.1	11.4			2	4	10.7					
								5	4	10.3	10.9				
								1	4	11.3					

Block 1

Nov. 28															
[illegible]	8	7.4						16	[illegible]	6.3	6.1	6.8			
[illegible]	8	7.3						17	[illegible]	[illegible]					
[illegible]	3	[illegible]	8.1	8.1				[illegible]	[illegible]	[illegible]					
[illegible]	[illegible]	[illegible]	[illegible]					[illegible]	[illegible]	[illegible]	7.1				
[illegible]	[illegible]	[illegible]	8.0					[illegible]	[illegible]	[illegible]	7.3				
[illegible]	[illegible]	[illegible]	[illegible]					[illegible]	[illegible]	[illegible]					
[illegible]	[illegible]	[illegible]	7.6	7.1	7.7			[illegible]	[illegible]	6.9	7.7	7.1			
[illegible]	[illegible]	[illegible]	[illegible]					[illegible]	[illegible]	[illegible]	[illegible]				
								17	3	[illegible]	[illegible]				

Block 5 (Cont'd)

15	13	7.4	8.4	16	4	7.6	7.8
16	1	8.2	8.4	18	20	7.8	7.8
17	1	8.4	7.8	17	22	7.8	7.8
18	1	7.3		17	4	7.6	
				16	4	7.8	8.1
				18	5	7.2	7.7

Note: Where two values are underlined they represent duplicate determinations o
the same sample. In some cases these samples were held several days in the oil
room so the second value may be on a riper sample. Other values (not underlined
given for the same tree are duplicate samples. The large number of different tr
sampled were an attempt to get the effect of fertilizer treatments.

Lyle Data 1953

Each Determination is Composite or average of 10 fruits

1953	Kendall		Brooks		Flag		Block 5		Block 9	
	Wt.	% oil	Wt.	% oil	Wt.	% oil	Wt.	% oil	Wt.	% oil
8-18	383	3.0	387	3.4						
	438	2.3	270	3.4						
8-25	380	4.0	407	4.6	354	4.9	437	4.3	381	4.1
	471	3.8	388	4.0	260	4.2	315	3.2	321	3.6
9-1	409	4.3	415	5.1	361	5.3	466	4.6	385	5.5
	300	3.2	321	4.1	297	4.1	354	4.0	338	4.8
9-8	426	4.4	413	4.9	379	5.8	382	4.2	490	5.6
	297	3.3	341	4.7	307	4.9			418	5.4
9-15	351	4.0	431	5.1	396	5.7	553	5.3		
							386	4.4		
9-22	462	5.1	486	5.8	435	5.7	475	5.1		
	356	4.8	488	5.5	316	4.7				
9-30	498	5.0	496	6.9	383	5.5				
	351	4.9	459	6.4	280	5.5				
10-6	472	5.4	519	6.2	388	5.9	535	6.2		
	369	5.2	465	6.1	312	6.0				
10-12	389	6.0	519	6.3	358	8.1			517	7.1
	388	5.6	389	5.1	376	6.7				
10-19							530	6.6	585	7.7
10-22	380	6.3	485	7.0	382	8.3				
	438	5.5	359	6.3						
10-26	388	6.4	388	7.3						
	467	5.5	388	6.6						
11-2							564	8.0		
11-4									545	8.4
11-10			451	7.3						
			440	6.8						
11-17	397	6.9	440	9.0			583	7.6	563	8.7
	439	6.7	440	6.9						
11-27							497	6.4	587	9.2

[fol. 69c]

1938	Bandell Wt.	Bandell % ash	Bayside Wt.	Bayside % ash	Kiwa Wt.	Kiwa % ash	Block 1 Wt.	Block 1 % ash	Block 2 Wt.	Block 2 % ash
12-1	580	8.0	562	7.7	482	9.6				
	495	7.2	472	8.8	351	9.4				
12-7							616	6.6*		
							599	8.0*		
							518	7.8*		
							563	7.4*		
							531	7.9*		
							489	6.7*		
							470	8.4*		
12-8	537	8.0.	564	7.8						
	496	7.1	452	7.1						
12-14									545	9.1*
12-16	570	8.0	542	10.4			586	8.0*	563	12.6*
	462	8.0	492	9.4					592	11.0*
									607	11.9*
									554	10.8*
									538	12.7*
									599	11.6*
									582	10.0*
									585	12.0*
									540	10.4*
12-29	551	9.5	468	10.7						
1-13	618	9.4	589	11.1						
	533	8.7	469	9.3						

* Each of these determinations on Dec. 7, 14 and 16 is from a single tree--all different trees.

Lula Data 1954

8-30	355	3.1	368	3.8	310	3.8
9-7	400	3.8	434	4.7	403	4.9
	303	3.3	363	4.4	389	4.8
9-13	439	4.4	433	5.1	407	4.8
	360	3.8	388	4.4	362	4.3
9-20	439	5.0	445	5.3	441	5.6
	367	4.4	356	4.6	373	5.2
9-27	441	4.6	472	5.1	468	5.7
	390	4.6	373	5.7	358	5.5
10-4	316	5.6	486	5.8	446	6.5
	404	5.2	370	5.4	384	6.1
10-11	382	6.6	493	6.8	305	7.0
	488	5.4	417	6.3	411	6.9

Booth 8 Data 1953

Each Determination is a Composite of 10 fruits

1953	Bushell		Brooks		Flag		Block 5	
	Wt.	% oil	Wt.	% oil	Wt.	% oil	Wt.	% oil
8-18	360	3.8	319	3.5	360	3.6		
	175	3.0	208	3.3	246	2.7		
8-25	317	3.6	342	3.8	360	3.6	136	3.8
	803	3.4	853	3.3	246	2.7	275	3.8
							470	4.1
							861	3.3
9-1	362	4.9	335	3.9	362	3.8	411	4.7
	823	3.6	274	3.5	255	3.0	296	3.7
							238	3.9
9-8	308	4.5	374	4.6	308	4.7	343	3.6
	198	3.3	231	4.0	227	4.0	252	4.0
9-15	305	5.2	269	4.3			364	5.2
							262	4.5
9-22	354	5.9	403	5.2	314	4.8		
	221	5.0	248	4.4	190	4.7		
9-29	375	5.9	360	4.9	310	5.7		
	270	5.3	243	4.7	187	5.2		
10-6			394	5.0	379	5.4		
			287	4.6	233	5.3		
10-13	385	6.3	358	4.9	382	5.4		
	288	4.9	274	4.9	288	6.4		
10-22	393	6.1	328	5.9	373	5.9		
	287	5.8	322	5.4	243	6.7		
10-28	375	6.7	347	5.5	406	6.8		
	286	6.1	277	4.4	250	6.4		
11-10	427	6.6	434	6.6	407	6.6		
	384	6.4	298	6.1	279	6.9		
11-17			409	6.9				
12-1			446	8.3				
			330	9.3				

Booth 8 Data 1954

1954						
8-16	288	3.8				
8-23	313	4.0	285	3.5	243	3.2
8-30			320	3.6	343	4.1
9-7	395	4.0	395	4.9	342	4.5
	294	4.4	256	4.1	265	3.8
9-13	410	5.3	331	4.3	385	4.4
	295	4.5	238	3.9	288	4.4
9-20	354	4.9	360	5.0	294	4.3
	308	4.9	261	3.7	193	5.4

[fol. 69e]

Booth 8 Rate 1954 (Cont'd)

1954	Rudgill Wt.	Rudgill % oil	Rogan Wt.	Rogan % oil	Flag Wt.	Flag % oil
9-27	390	6.2	335	5.7	331	5.0
	372	5.2	868	5.3	239	5.4
10-4	388	6.0	390	5.5	392	5.6
	279	5.1	868	5.3	214	6.7
10-11	333	6.0	399	6.1	387	5.4
	273	5.3	860	6.6	273	5.6

Booth 8 Effect of Size

Weight Large	Weight Small	Weight Difference	Oil Large	Oil Small	Oil Difference
360	175	185	3.8	3.0	.8
319	208	111	3.5	3.3	.2
317	203	114	3.6	3.4	.2
342	253	109	3.8	3.3	.5
360	246	114	3.6	2.7	.9
336	225	111	3.8	3.8	0
469	261	208	4.1	3.3	.8
411	296	115	4.7	3.7	1.0
362	223	139	4.9	3.6	1.3
335	274	61	3.9	3.5	.4
362	255	107	3.8	3.0	.8
328	225	103	4.4	3.3	1.1
308	227	81	4.7	4.0	.7
302	190	112	4.5	3.3	1.2
274	231	43	4.6	4.0	.6
343	252	91	3.6	4.0	-.4
314	190	124	4.8	4.7	.1
493	268	155	5.2	4.4	.8
354	221	133	5.9	5.0	.9
360	243	117	4.9	4.7	.2
310	187	123	5.7	5.2	.5
375	270	105	5.9	5.3	.6
317	240	77	5.8	5.8	0
354	247	107	5.0	4.6	.4
379	233	146	5.4	5.3	.1
362	266	96	5.4	6.4	-1.0
358	274	84	4.9	4.9	0
369	288	97	6.3	4.9	1.4
373	234	139	5.9	6.7	-.8
	29	3290		89	13.3
		112			.46

1953 Determinations of Oil and Water. Individual fruit.

Rep. 4 Lula Block 9, R3, T3		
% oil	% dry wt.	oil on dry basis
7.8	20.7	37.4
8.4	22.1	38.0
8.6	24.5	35.0
9.2	23.9	38.4
7.6	21.6	35.0
9.9	24.0	41.3
9.4	23.5	39.6
9.1	23.4	39.0
7.5	23.5	31.8
6.4	23.0	27.8
8.39		37.33

Rep. 6 Booth 8, Block 5		
% oil	% dry wt.	oil on dry basis
8.4	18.3	45.7
6.1	17.9	33.8
4.7	17.6	26.5
6.7	19.0	35.0
6.1	18.1	33.5
6.0	18.8	31.8
6.0	18.8	31.8
6.7	19.2	34.8
5.4	18.6	29.0
6.0	18.8	31.8
6.21		33.38

Rep. 2 Booth 7 Pahokee		
7.4	21.9	33.8
6.7	23.6	28.1
7.3	22.1	32.8
7.6	22.2	34.0
5.6	20.6	27.0
7.3	23.3	31.0
6.3	21.5	29.2
4.7	20.8	22.4
6.1	20.6	29.5
6.6	22.9	29.0
6.55	21.95	29.69

Rep. 9 Taylor Block 5		
8.4	18.2	45.8
8.3	18.1	45.5
8.3	18.8	43.8
9.9	19.3	51.3
9.0	19.6	45.8
6.3	17.4	36.0
8.1	18.5	43.5
8.4	18.0	46.5
6.7	16.4	40.7
7.1	17.2	41.0
8.05		44.01

Rep. 9 Lula Block 9, R3, T3		
8.3	20.5	40.5
9.6	22.7	42.3
10.0	22.6	44.2
9.2	21.2	43.4
8.9	24.3	36.5
11.3	23.6	48.0
7.4	22.0	33.6
7.6	22.5	33.6
7.6	23.1	32.8
7.4	19.0	38.8
8.73		39.39

Rep. 20 Booth [illegible] ek 9, R1, T
11.1	25.4	43.5
9.9	25.5	38.6
8.9	21.8	41.0
10.7	25.0	42.3
9.5	22.9	41.6
9.4	25.1	37.4
7.7	24.1	31.6
8.0	21.8	36.6
7.2	23.1	31.0
9.9	25.6	38.7
9.83	24.13	38.85

[fol. 69g]

Rep. 20	Lula	Booth 9, Rl7, T1.
7.9	20.6	39.6
5.8	20.9	27.8
6.7	20.9	31.8
6.6	19.8	33.4
7.8	20.9	37.2
8.5	22.2	38.4
8.2	19.0	42.8
7.2	20.3	35.5
8.2	21.6	38.2
6.3	21.6	29.4
7.02		35.41

Rep. 21	Booth 7	Block 3, R14, T1.
5.8	18.7	31.2
5.8	19.3	30.2
5.3	19.7	27.0
6.3	20.2	31.2
4.1	17.0	24.0
6.0	18.8	32.0
5.8	19.2	30.2
5.8	19.5	29.8
5.7	19.0	29.8
4.4	16.7	32.2
5.50		29.70

Effect of Ripening

It is hard to give quantitative data on the change of oil content particularly since no quantitative measure of softness was made at the time of sampling. It appears that the changes are slight for the first few days but that there is a considerable increase in going from the stage of just soft enough to eat to the stage of overripe but still edible. The data will be listed as random observation. Other data are available.

Waldin (Individual fruits)

0 days	5 days (ripe)	7 days (overripe)
3.9	3.6	6.4
5.0	4.0	6.3
4.8	4.9	5.8
5.3	5.2	6.4
4.9		6.4

Hall

0 days	3 days	6 days
9.0	9.1	9.6
8.8		10.5
9.0		9.4

Waldin

0 days	2 days	6 days (ripe)
4.9	4.9	4.5
5.8	5.5	5.1

Booth 7

0 days	6 days (ripe)
6.2	6.4
5.1	5.6
9.6	10.4
10.6	9.8

Lula

0 days	3 days	6 days (ripe)
8.9	9.6	10.1
9.0	10.1	9.0

[fol. 70]

Plaintiffs' Exhibit 17

South Florida Growers Association, Inc.

Avocado Shipments Barred From Sale in California

November 10, 1954, shipped 449 boxes* (134/24s, 42 27s, 147 30s, 126/36s) and 359 flats (229/9s, 130 10s) of Lula avocados to Calavo, Inc., Los Angeles, California. Upon arrival at Los Angeles, 118 boxes (42/36s, 76 30s) were rejected upon test of oil content; reshipped to Phoenix, Arizona. Sales in Los Angeles averaged $4.43 per box whereas sales in Phoenix were only $4.17 per box; added transportation and handling costs brought loss on shipment to $59.85.

November 11, 1954, shipped 650 boxes Booth 7 avocados, 539 30s and 111 36s, on consignment to Calavo, Inc., Los Angeles, California. On arrival at Los Angeles, 428 30s and 111 36s were rejected upon test of oil content. Fles were reshipped to Calavo, Inc., at Phoenix, Arizona and sold at average of $3.92 per box as compared with sales in Los Angeles at $4.50 per box; added transportation and handliag costs amounted to $158.14; total loss $394.20.

November 12, 1954, shipped 650 boxes (575 30s, 75 36s) of Lula avocados to Calavo, Inc., Los Angeles, California. Upon arrival at Los Angeles, 97 boxes (30 size) were rejected upon test of oil content; reshipped to Phoenix, Arizona. Sales in Los Angeles averaged $4.43 per box, whereas sales in Phoenix averaged $3.90 per box; added transportation and handling costs brought loss on shipment to $75.39.

[fol. 71] November 18, 1954, shipped 650 boxes of Lula avocados to Calavo, Inc., Los Angeles, California. Upon arrival at Los Angeles, 72 boxes were rejected upon test of oil content; reshipped to Phoenix, Arizona; added transportation and storage costs resulted in loss on shipment amounting to $24.89.

---

* Boxes, 40 lbs; flats (or lugs), 15 lbs.

November 16, 1955, shipped 677 boxes (140/30s, 395/36s, 142/41s) of Lula avocados to Lucky Stores at San Leandro, California, on order of Calavo, Inc., San Francisco. These were originally sold at $5.00 per box delivered. Upon arrival at San Leandro, the 30-size and 41-size boxes, amounting to 282 boxes, were rejected upon test of oil content; reshipped to Calavo, Inc., Portland, Oregon; sold there at lower price, and added transportation and storage costs resulted in loss of $210.62 on this shipment.

November 29, 1956, shipped 1,550 flats of Lula avocados (65/12s, 158/14s, 721/16s, 656/18s) to Calavo Growers of California, Los Angeles, California, on consignment. Upon arrival at Los Angeles, the 721 flats of 16-size avocados were rejected upon test of oil content; reshipped to Calavo Growers of California at Phoenix, Arizona. The average selling price in Los Angeles was $3.00 per flat, whereas the fruit sold in Phoenix averaged $2.08 per flat; added transportation and handling costs resulted in loss of $821.62 on this shipment.

[fol. 72] November 14, 1957, shipped 1,795 flats of Lula avocados (62/10s, 1051/12s, 492/14s, 190/16s) to Lucky Stores at San Leandro, California, on order of Calavo Growers of California, San Francisco. Upon arrival at San Leandro, the 492/14s were rejected upon test of oil content; reshipped to Calavo Growers of California at Salt Lake City, Utah, where they were sold at $1.00 per flat. Since these avocados were originally sold at $1.89 per flat at San Leandro, a loss of $.89 per flat resulted in addition to added transportation and handling costs of $202.02, making a total loss on the shipment of $639.90.

[fol. 73]

PLAINTIFFS' EXHIBIT 19

SOUTH FLORIDA GROWERS ASSOCIATION, INC.

Avocados handled in calendar years
1954, 1955, 1956, 1957

(In bushels, at 55 pounds per bushel)

Total volume	*Sales in Florida*	*Sales in California*	*Sales in other states*
1954			
166,818	—	5,734	161,084
1955			
206,308	—	11,673	194,635
1956			
144,048	9,272	15,055	119,721
1957			
181,628	6,762	2,443	172,423

[fol. 74]

PLAINTIFFS' EXHIBIT 20

FLORIDA LIME AND AVOCADO GROWERS, INC.

Avocados handled in seasons
1955-56; 1956-57; 1957-58*

*Total Volume in Bushels***	*Sales in Florida*	*Sales in California*	*Sales in Other States*
1955-56 : 59,543	418	10,806	46,319
1956-57 : 30,191	210	3,415	26,566
1957-58 : 34,099	156	2,538	31,405
(To Jan. 10, 1958)			
TOTAL 123,833	784	16,759	106,290
% of Total-- 100%	.0063%	13.53%	85.84%

* Season about August 1 to February 15
** Bushel—55 lbs.

1954-55 season: total volume handled—	47,954	bushels
Sales in California—	12,641	"

Other distribution figures not available.

[fol. 75]

PLAINTIFFS' EXHIBIT 21

FLORIDA LIME AND AVOCADO GROWERS, INC.

Avocado Shipments Barred From Sale in California

November 10, 1955, shipped 1129 lugs of Lula avocados, 12 per lug (12's), on sale to Safeway Stores, Oakland, California (through buying office at Lakeland, Florida) @ $1.85 per lug delivered, total $2,088.65; entire load rejected in California upon test of oil content and reshipped to E. O. Muir, Salt Lake City, Utah; proceeds of sale in Salt Lake City, net after added transportation and handling costs, $711.60; loss $1,377.05.

November 12, 1955, shipped 800 lugs of Lula avocados, 12 per lug (12's) on sale to Safeway Stores at Sacramento, California, and 1283 lugs Lula avocados (12's) to Safeway Stores at Oakland, California, (through buying office at Lakeland, Florida) @ $1.85 per lug delivered, total $3,853.55; entire load rejected in California upon test of oil content and reshipped to United Brokers, Inc., Portland, Oregon; proceeds of sale in Portland, net after added transportation and handling costs, $1,683.01; loss $2,170.54.

November 14, 1955, shipped 2208 lugs of Lula avocados, 12 per lug (12's), on sale to Safeway Stores, Oakland, California, (through buying office at Lakeland, Florida) @ $1.85 per lug delivered, total $4,084.80; entire load rejected in California upon test of oil content and reshipped to Pacific Fruit and Produce Company, Medford, Oregon, and Seattle, Washington, proceeds of sale in Medford and Seattle, net after added transportation and handling costs, $1,788.20; loss $2,296.60.

[fol. 76] December 8, 1955, shipped 700 lugs of Lula avocados and 200 bruce boxes of Lula avocados (40 pounds net weight), on sale to Mendelson-Zeller Company, Los Angeles, California, @ $2 per lug, and @ $4 per bruce, total $2,200; entire load rejected in California upon test of oil content and reshipped to Crombie & Company, El Paso, Texas; proceeds of sale in El Paso, net after added transportation and handling costs, $548.18; loss $1,651.82.

November 15, 1957, shipped 1874 lugs of Lula avocados to California, 900 lugs on consignment to Williams and Son Produce Company, Los Angeles, and 974 lugs on consignment to Felix Cohen & Son, Oakland; 361 of the lugs unloaded at Los Angeles, rejected upon test of oil content (sizes 16's and 18's); reshipped to Phoenix, Arizona, and added transportation and handling expenses included in price paid by buyer.

PLAINTIFFS' EXHIBIT 22

LOS ANGELES COUNTY
AGRICULTURAL COMMISSIONER
STANDARDIZATION DIVISION
307 WHOLESALE TERMINAL BUILDING
LOS ANGELES, CALIFORNIA TELEPHONE VA 4577

No 59762

STANDARDIZATION VIOLATION—HOLD REPORT

NOTICE: (1) The below described lot, including the containers thereof, is a public nuisance. Until reconditioned or otherwise brought into compliance the transportation or sale of such lot is illegal. (2) If the lot is held and a "Hold Tag" has been affixed to the lot, as indicated above, it is unlawful to remove the lot from its present location except under the specific direction of an authorized enforcing officer. Unless such lot held by the enforcing officer is reconditioned or otherwise brought into compliance by not later than ..... o'clock (a.m.) (p.m.) ....., 195..., or written consent to destroy or otherwise dispose of said lot shall have been given to the enforcing officer by the persons served with notice of noncompliance, the commodity or commodities are subject to the order of any court of competent jurisdiction to destroy such lot or otherwise abate the nuisance.

DATE Nov 19__ TIME 6:30 A.M. INSPECTOR [illegible]

AMOUNT 3 Cartons KIND Avocados

IDENTIFYING MARKS 16 Sixes 28 Flora Brand Lots

FOUND IN POSSESSION OF Williams & Sons

AT (ADDRESS) 714 [illegible] L.A. T.B.A.

CAR OR TRUCK NO _____ RETAIL DEPT. WHOLESALE DEPT. RANCH PKG. HOUSE

CONSIGNOR Houghland Sales Inc.

ADDRESS Pomona Flower Growers Inc

DELIVERED BY _____

ADDRESS _____

UNLAWFUL ACT Possession

SECTION NO 784.

NON-CONFORMITY OF COMMODITY Immaturity, Excess of Internal Avocados

SECTION NO 784

LOT HELD ~~NOT HELD~~ Mkg - 9.5, 9.0, 10.9, 5.8, 12.9

REMARKS 701-1851 28-7.4, 9.9, 7.3, 7.5, 9.0
791-1851 1-7.1, 7.8, 7.3, 9.6, 9.1
Tests added by Petitioner.
Los Angeles Ag. Comm.

VIOLATION NOTICE (X) HOLD NOTICE (__) ISSUED 11/20/57

LOT TO BE IN COMPLIANCE BY _____ O CLOCK _____

I HEREBY AGREE TO _____
to comply with the provisions of the California Agricultural Code

SIGNATURE [signature]

59762

78 5 63 12 56 5440

[fol. 78]

Defendants' Exhibit P

	Date	To	Flats	Boxes	Return and Amount Lot #		Average	Invoice No
1	10-29054	Oakland		650	52	2612.81	4.50	18386
2	11-9-54	San Diego		300	2883	1018.32	$ 3.96	18494
3	11-10-54	Oakland		650	62	2716.56	4.75	18499
4	11-11-54	Los Angeles		650	2332	2212.66	4.14	18508
5	11-11-54	Los Angeles	615	650	22331	2562.61	4.57	18509
6	11-12-54	Los Angeles		650	2335	2462.98	3.70	18517
7	10-10-54	Los Angeles	359	449	2330	2103.79	3.66	18500
8	11-12-54	Los Angeles		650	2336	2415.27	4.55	18518
9	11-13-54	Oakland		450	66	1788.46	4.52	185.28
10	11-13-54	San Francisco		200	66	794.87	4.52	18529
11	11-15-54	Oakland		650	68	2693.59	4.71	18544
12	11-16-54	San Diego	500		2894	660.00	1.30	18565
13	11-18-54	Los Angeles		650	2342	1882.43	2.97	18581
14	11-19-54	Los Angeles		650	2343	1409.47	2.66	18594
	[illegible]	[illegible]						
	11-15-55	San Francisco		675	624	2890.56	5.00	20228
	11-16-55	San Francisco		677	625	2763.76	4.95	20233
	11-1655	Los Angeles		675	3201	2900.28	4.97	20238
	11-18-55	Los Angeles		775	3203	3507.84	5.21	20248
	11-18-55	Los Angeles		650	3203	2793.30	4.97	20252
	11-22-55	Los Angeles		675	3204	2827.74	4.85	20262
	11-23-55	Los Angeles		675	3205	2752.01	4.72	20265
	11-23	Los Angeles		675	3206	2497.21	4.33	20266

[fol. 79]

Defendants' Exhibit Q

California Avocado Shipments 1956/57 season

	Truck No	Invoice No	Pkgs	Av		
8-16/56	551	21400	1600	377		
10-6	554	21401	1550	417		
11-17	556	21406	1570	271		
11-21	560	21415	1600	271		
11-28	561	21416	1600	311		
12-13	563	3629	1600			
12-13	564	3630	1600	270		
12-14	570	3640-41	1600			
12-16	573	3671	1600			
12-17	575	3671-72	1600			
12-17	578	3671-72	1600			
12-19	* 579	21438	1600			*
12-21	589	21451	1600			
12-3	592	3711	1600			
12-4	595	3717	1600			
12-4	596	3723	1600			
12-5	598	21462	1600			
12-5	599	3734-35	1600			
12-6	601	21466	1600			
12-6	603	21469	1600			
12-7	606	3738	1600			
12-8	608	3740	1600			
12-8	609	21471	1600			
12-13	612	21479-83	1200 / 380			
12-15	613	21516	1600			
12-15	617	3788	1600			
12-15	628	3791	1600			
12-18	630	21499	1403			
12-20	638	21506	1600			
12-21	639	21508-14	1600			
1-4-57	"	21533	1575			
1-8	"	21504	1600			
1-15	21	21557	1600	273		
1-17	24	21562	1600			
	- 34 -		54100			
11-7	563	21015	1803	166		
"	573	21045	1938	179		
"	576	21056	1700	138		
12-7	* 579	21101	1795	147		*
	628	21516	1700	160		

DEFENDANTS' EXHIBIT R

California Tuna Shipments

1955-56 season

	Truck	Invoice	Fla	Box	
11/15/55	524	V0V76	-	675	
11/16	549	V0V36	-	675	
11/23	551	20V65	-	675	
11/5	59	20314	1700	125	
11/9	598	20334	1684	125	
11/10	608	20340	1684	125	
11/13	620	20360	1674	125	
11/14	623	20364	1664	125	
11/15	624	20373	1600	125	
11/16	635	20385	1575	125	
11/21	649	20416	1655	125	
11/22	659	20422	1660	125	
11/30	630	20459	1660	125	
	628	20454	1645	125	
12/4/56	2	20470	1650	125	
12/9	37	20507	360	225	
12/10	40	20536	1650	225	
12/6/55	528	20345	6	677	
11/22	537	20498		775	
11/28	540	20525		1650	
11/22	546	20562		675	
11/23	558	20566	-	675	

[fol. 81]

DEFENDANTS' EXHIBIT "S"

FLORIDA LIME AND AVOCADO GROWERS, INC.
Avocados Shipped to California

1954-55 season	*No. of Lugs**
10-18	2200
10-19	2100
10-19	2200
10-20	2200
10-21	2200
10-23	2200
10-26	2200
10-26	2200
10-26	1800
10-27	1900
10-28	2200
10-29	2200
11-2	2200
11-3	2200
11-5	2200
11-5	2000
11-5	2000
11-9	2200
11-10	2200
11-11	2208
11-11	2200
11-12	2100
11-12	2200
11-12	1000
11-16	1600
11-16	1200
11-16	2200
11-17	2200
11-18	1300
11-19	2200
	63,208 lugs

* Lug used in 1954-55 season contained 11 pounds of fruit; 5 lugs per bushel.

In 1955-56 and subsequent seasons, lug used contained 13½ to 15 pounds of fruit; approximately 3½ lugs per bushel.

[fol. 82]

1955-56 Date	*No. of Lugs*
11-5	1913
11-8	1950
11-8	1914
11-9	1914
11-9	2000
11-10	1929
11-10	1915
11-11	1915
11-11	1900
11-12	2083
11-12	2045
11-12	1900
11-14	2208
11-15	2096
11-16	2000
12-1	1900
12-3	2000
56-1-4	2000
	35,480

[fol. 83]

1956-57 *Date*	*No. of Lugs*
56-12-28	1805
12-14	1850
12-6	2004
12-12	2000
57-1-9	1909
1-16	400
1-16	1425
1-25	2026
	13,419 Lugs

1957-58 *Date*	*No. of Lugs*
11-14	900
11-14	974
11-18	678
12-9	2043
12-12	2035
12-13	1795
12-17	760
12-20	786
	9,971 Lugs

BRIEFS

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 8 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] '19

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division

APPELLANTS' JURISDICTIONAL STATEMENT

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233 South Beverly Drive,
Beverly Hills, California,
Attorney for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division

APPELLANTS' JURISDICTIONAL STATEMENT

Opinion of District Court

On December 17, 1958, the three-judge District Court filed a "Memorandum and Order" dismissing the action for want of jurisdiction. (Appendix I, *infra*, Ap. 1.) This opinion is not reported.

Jurisdiction of the Appeal

Nature of proceeding: Appellants, "handlers" of avocados grown in Florida, seek declaratory judgment and injunction to restrain the state officers of California from

continuing to enforce against them the provision of section 792 of the Agricultural Code of California prohibiting sale in that state of avocados containing less than 8% oil content. (Appendix II, *infra*, secs. 784, 785 and 792 of Agricultural Code of California.)

Statute pursuant to which action is brought: The complaint invokes jurisdiction of the District Court pursuant to both sections 1331 and 1337 of the Judicial Code (28 U. S. C., secs. 1331 and 1337). Paragraph III of the complaint [R. 2] alleges that the matter in controversy is the right of appellants to market Florida avocados in California free from the 8% oil content restriction of section 792 of the Agricultural Code of California; that the controversy arises under the commerce clause of the United States Constitution, article I, section 8, clause 3, and the equal protection clause of section 1 of the Fourteenth Amendment, and that as to each of the appellants the matter in controversy exceeds the value of $3,000 exclusive of interest and costs. Further in the complaint it is alleged that California's 8% oil requirement, particularly when applied to the varieties of avocados preponderantly grown in Florida, has no scientific validity as a test of the maturity or quality of the fruit; that the varieties of avocados grown in Florida and marketed by appellants come to maturity with far lower oil content than the varieties preponderantly grown in California, due to difference in origin and growing conditions, but are not for that reason less wholesome or palatable; that the 8% oil content requirement for sale of avocados in California, when applied to avocados grown in Florida, operates as a virtual embargo against sale of the Florida avocados in the highly favorable California market, and that the protected home market thus afforded to the growers and handlers of California avocados gives them an arti-

ficial competitive advantage over the growers and handlers of Florida avocados in all markets. [Pars. XXII, XXIII, XXVIII, XXIX and XXXI of complaint, R. 10, 11, 13, 14.]

Jurisdiction of the District Court is invoked under 28 U. S. C. section 1337, also, in that the controversy arises under an Act of Congress regulating interstate commerce, namely, the Agricultural Marketing Agreement Act of 1937. [Par. IV of complaint, R. 3-4; Appendix III, *infra*, provisions of Marketing Agreement Act.] The complaint recites that on June 11, 1954, pursuant to agreement made by the Secretary of Agriculture with the growers and handlers of avocados in South Florida in the manner prescribed by the Agricultural Marketing Agreement Act of 1937, there became effective the Secretary's marketing order No. 969 (referred to as No. 69); that maturity and quality standards for the marketing of the avocados in interstate commerce were established by a series of orders issued by the Secretary from time to time, also inspection procedures to enforce said orders; that since June 11, 1954 appellants have been registered as handlers under marketing order No. 69 and all avocados handled by appellants have been marketed in compliance with the standards and procedures established pursuant to said order. [Pars. V to XIII and XXIV (a) of complaint, R. 3-7, 11; also Exs. A, B and C attached to complaint, R. 17-24.] Appellants pray for an adjudication that prohibition of delivery and sale in California of avocados grown in Florida and shipped in interstate commerce in compliance with the orders and regulations made by the Secretary of Agriculture, acting pursuant to the authority vested in him by the Agricultural Marketing Agreement Act of 1937, is an impermissible nullification of the power exercised by Congress under

article I, section 8, clause 3 of the Constitution of the United States to regulate commerce among the states. [Par. XXX and prayer C of complaint, R. 14, 15.]

The complaint alleges that no practical or adequate remedy is available to appellants in the premises save by the equitable process of injunction [Par. XXXII, R. 15] and prays for a hearing of the case by a three-judge court, as provided by 28 U. S. C. sections 2281 and 2284.

Date of judgment and notice of appeal: Judgment dismissing the action for want of jurisdiction and awarding costs to appellees was entered January 13, 1959. [R. 175.] Notice of appeal was filed by appellants February 12, 1959, in the office of the clerk of the United States District Court, Northern District of California, Northern Division. [R. 216.]

Statutory provision for appeal: The appeal is taken pursuant to 28 U. S. C. section 1253. [Notice, R. 216.]

Cases sustaining jurisdiction: The recent decisions in *Ivers v. Dwyer*, 79 S. Ct. 178, and *Doud v. Hodge*, 350 U. S. 485, and 354 U. S. 457, are believed to sustain jurisdiction of this appeal.

In *Ivers v. Dwyer* the appellant brought suit in the United States District Court for the Western District of Tennessee for declaratory judgment and injunction to restrain enforcement against him and others similarly situated of a Tennessee statute requiring buses to provide segregated seating arrangement for passengers according to race. Appellant, a negro passenger, refused to comply with a direction to seat himself in the space in a Memphis bus assigned to colored passengers and left the bus when threatened with arrest for his refusal. The three-judge District Court declined to pass upon appellant's claim that

the challenged statute violated his constitutional right, on the ground that the complaint failed to present an "actual controversy," and entered a judgment of dismissal. This court held that the District Court erred in not proceeding on the merits, reversed the judgment of dismissal, and remanded the case for further proceedings in the District Court.

In *Doud v. Hodge* the appellants (in 350 U. S. 485) brought suit in the United States District Court for the Northern District of Illinois, under 28 U. S. C. 1331, for injunction to restrain enforcement against them by the state officers of the provisions of the Currency Exchange Act of Illinois, alleging that exemption from the provisions of the statute of persons selling American Express Company money orders was discriminatory and in violation of the equal protection clause of the Fourteenth Amendment. The three-judge District Court dismissed the complaint for want of jurisdiction, in the absence of a prior determination by the state courts of the validity of the statute. This court vacated the judgment and remanded the case to the District Court for further proceedings. On the remand, the case was heard on the merits and judgment was entered in favor of the plaintiffs (146 F. S. 887), whereupon this court entertained an appeal by the defendants and affirmed the judgment. (*Morey v. Doud*, 354 U. S. 457.)

Statute involved: The California statute here involved is section 792 of the Agricultural Code of California (Deering's Agricultural Code of California, 1950 edition and supplements). Section 792, together with enforcement provisions of the Agricultural Code, is set forth in Appendix II, *infra*, Ap. 10.

Question Presented by the Appeal

Did the District Court properly dismiss the action, without a hearing on the merits, for alleged want of jurisdiction of the subject matter?

The complaint was filed November 13, 1957. [R. 1.] Appellees filed a joint answer to the complaint, pleading five defenses, on December 6, 1957. [R. 20.] Thereupon, on February 24, 1958, appellants requested the court to set the action for early plenary trial, in lieu of an application for an interlocutory injunction. [R. 33.] Prior to the time of this motion, depositions of five witnesses had been taken at Miami, Florida, and numerous documentary exhibits marked for identification. [Vol. II of Record, original depositions and exhibits.] Interrogatories were propounded by appellants to appellee W. C. Jacobsen, Director of Agriculture of the State of California, and interrogatories were propounded by appellees to Harold E. Hall, president of appellant South Florida Growers Association, Inc., and to Fred Piowaty, secretary of appellant Florida Lime and Avocado Growers, Inc. [Interrogatories and answers, R. 35, 38, 54, 57, 148, 153.]

February 26, 1958, appellees filed a motion for an order allowing an agreed textual amendment of the complaint, also for leave to file an amended answer to the complaint pleading an additional defense. [R. 50.] While this motion was pending on appellants' objections to the filing of the proposed additional defense, appellees filed a motion directed to appellant Florida Lime and Avocado Growers, Inc. for dismissal of the action or alternatively for stay of proceedings "pending an authoritative interpretation of the challenged California statutes and regulations by the California courts." [R. 60.] A like motion was filed, directed to appellant South Florida Growers Association,

Inc. [R. 106.] Leave to file the amended answer to the complaint was granted March 20, 1958. [Order, R. 108; amended answer, R. 112.]

A three-judge court having been convened, a hearing was held April 18, 1958 on appellees' motions for dismissal or stay of the action. [R. 165.] Eight months later, on December 17, 1958, the court filed its memorandum dismissing the action. [R. 166; also Appendix 1, *infra*, Ap. 1.]

The motions to dismiss or stay the action were made not only on the pleadings, but also the depositions aforesaid and exhibits identified by the deposition witnesses, the answers to interrogatories, and the affidavit filed with the motions. [Motions, R. 60-61, 106-107; final judgment, R. 175-176.]

To the extent that the decision of the District Court is of factual nature, manifestly, it is based on incomplete evidence and on oral testimony and documentary exhibits never submitted or received in evidence. Thus, the question on appeal arises in part on evidentiary matter not screened or validated by rulings of the court and not a defensible basis for factual conclusions. [Appellants' memorandum in opposition to appellees' motions, R. 117-118.]

The gist of the District Court opinion is that there is no actual controversy between appellants and the state officers in charge of enforcement of the challenged statute because, on the occasions when appellants shipped avocados to California which failed to pass the 8% oil test, appellants availed themselves of leave to reship the fruit to neighboring states instead of submitting the fruit to destruction as a public nuisance, as provided in section 385 of the Agricultural Code of California. (Appendix II, *infra*, Ap. 6.) An "actual controversy" could arise, as

stated by the District Court, only if there were a co-existence of four facts: (1) the bringing of avocados to California by appellants; (2) failure of the avocados to meet the standards fixed by law; (3) refusal of appellants to recondition or remove the avocados, and (4) an election by appellants to contest abatement of the avocados as a public nuisance as provided by section 785. [R. 169-170, Appendix I, *infra*, Ap. 3-4.]

In an action in which no question is raised about California's method of testing oil content of avocados or regarding the correctness of the determination of oil content in any particular instance, but only a question of the constitutionality of the 8% oil requirement for sale of appellants' avocados in California, is it proper to remit appellants to a state court procedure of the kind provided by section 785 of the Agricultural Code of California? Even if this procedure could go beyond immediate destruction of the load of avocados determined to be of less than 8% oil content, as provided by section 785 in the case of perishable fruit such as avocados, and even if thereafter an issue of the constitutionality of the 8% oil requirement, when applied to appellants' avocados, could somehow be raised and litigated in a section 785 proceeding, may appellants be thus forever barred from litigating such judicial issue in the appropriate federal court?

Facts Material to the Question Presented

The District Court declared: "The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues." [R. 170, Appendix I, *infra*, Ap. 4.] To what "past events" this

statement refers is not elucidated, except perhaps as appears from the prior statement that it is alleged "that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standards imposed by section 792, and that these non-conforming loads were not reconditioned by substitution,* but were removed from the state and marketed elsewhere." [R. 108; Appendix I, *infra*, Ap. 2.]

Facts of the case showing that there exists an actual controversy between appellants and the state officers of California regarding the constitutionality of section 792 of the Agricultural Code of California, and that appellants have a real, immediate and substantial interest in the determination of the validity of the statute, include the following:

1. Each appellant is a handler of Florida-grown avocados in large volume, also a grower of avocados. [Pars. I and XIV of complaint, R. 1, 7.] The volume of avocados handled by appellants in the crop year 1954-55 and subsequent years appears in PX 18 and PX 20. Gross proceeds from sales of avocados are stated in

*Nowhere in the record of this case, so far as it has proceeded, is an explanation vouchsafed of the manner in which a load of Florida avocados, rejected in California because of less than 8% oil content, could be "reconditioned." To suggest that this could be done "by substitution" implies that the oil content of avocados can be judged visually, by external appearance, instead of laboratory analysis of macerated samples. ("Official method for the determination of oil in avocados," R. 109-104.) Also, this suggestion seems to carry an implied admission that the maturity of avocados can be satisfactorily judged by external factors, such as size or weight at time of picking, as is done for each season and each variety under the Florida marketing agreement. [Paragraph X of complaint, R. 5.]

answers to interrogatories [R. 150-152, 154-155], as follows:

	Florida Lime and Avocado Growers, Inc.	South Florida Growers Association, Inc.
1954-55	$205,432	$820,008
1955-56	323,143	993,400
1956-57	233,358	1,006,241
1957-4/1 to 12/31	165,390	(No figure available)

2. Approximately 50% of all the avocados grown in the United States* are consumed in California. [Estimates based on answers to interrogatories made by appellee W. C. Jacobsen, R. 35-37, 38-48.]

3. There is large demand for Florida avocados in California, particularly in the months of October, November, December and January, when the supply of California avocados is at its lowest and the supply of Florida avocados is at its highest. [Pars. XV and XVI of complaint, R. 7-8; deposition of Harold E. Kendall, pp. 183-189.]

4. The demand for Florida avocados in California has induced appellants to attempt to avail themselves of the California market despite the barrier of California's 8% oil requirement. Because of danger of rejection of California shipments by application of the 8% oil test, appellants have risked such shipments only after procuring oil tests (by the California official method) at the University of Florida's Sub-Tropical Experiment Station at Homestead, Florida, to ascertain whether such shipments could reasonably be expected to pass the 8% oil test. These tests revealed that only a minor part of the crop

*Avocados are grown commercially only in California and Florida.

ever attained 8% oil content, and then only a month to two months or more after attainment of maturity and marketability under the standards established by the Secretary of Agriculture. [PX 12 and 13; Depositions, pp. 164-175, 254-255.] Even as to varieties of Florida avocados that sometimes attained 8% oil content, tests made over the course of several years showed substantial variations from grove to grove, from tree to tree, and even from different sides of the same tree, so that there was no consistency or reliability as to oil content. [Depositions of Dr. Roy W. Harkness, pp. 94-100, also record of a vast number of avocado oil tests made by Dr. Harkness in a research project carried on from the fall of 1951 into the year 1955, identified collectively as PX 16.]

Notwithstanding the restrictive effect of the 8% oil test, appellants have continued their endeavors to meet the California demand for Florida avocados. The volume of appellants' sales of avocados in California appears in PX 18 and 20, also DX P, Q, R and S, and the dollar amount is stated in answers to interrogatories [R. 151-152, 155], as follows:

	Florida Lime and Avocado Growers, Inc.	South Florida Growers Association, Inc.
1954-55	$94,553.	$78,905.
1955-56	56,616.	129,543.
1956-57	26,332.	15,065.
1957-4/1 to 12/31	13,906.	11,861.

The deposition testimony and exhibits show that the California sales were made by appellants five to eight weeks or more after the marketing ~~of the avocados~~ began in compliance with the regulations under the marketing agreement; that because of the impossibility of meeting

the 8% oil test at an earlier time, and uncertainty of meeting the test at any time, appellants have been unable to avail themselves of orders for Florida avocados from large chain grocery stores in California because of inability to give assurance of day to day deliveries, in correlation with the promotional and advertising programs of these stores. [Deposition of Harold E. Kendall, pp. 183-186, 213-214, 226-227; also dates of shipments to California as shown by DX P, Q, R and S.]

5. Rejection of a shipment of Florida avocados in California, for failure to pass the 8% oil test, involves risk of substantial loss. Such shipments are made in refrigerated truckloads of 400 to 450 bushels, of value at destination of $4,000 to $5,000, depending upon the prevailing wholesale prices. [Par. XXV of complaint, R. 12; Depositions, pp. 216-221, 229.] Since the fruit is highly perishable, especially upon interruption of refrigeration, reshipment to another state entails hazard of large loss, as illustrated by appellants' past experience [Pars. XXVI and XXVII of complaint, R. 12-13; also PX 17 and PX 21, and depositions of Messrs. Kendall and Piowaty, pp. 175-182, 255-259, 274.]

In addition to the direct loss resulting from rejection of a load of avocados in California and reshipment to other markets, there is risk of upsetting appellants' normal sales in these markets by the unscheduled arrival of the rejected avocados, in a condition of ripeness compelling immediate sale for any price obtainable. [Depositions, p. 181.].

6. The extensive research work of the witness Dr. Roy W. Harkness on the subject of maturity of the varieties of avocados grown in Florida demonstrates that California's 8% oil requirement is not a scientifically

valid standard for maturity of these avocados. [Depositions, pp. 93-106.]

7. Although appellees were permitted to plead as an additional defense that the quality and maturity standards promulgated under Marketing Order No. 69 fail to comply with the Marketing Agreement Act, likewise the methods and procedures used in the administration thereof, the deposition of R. M. Wimbish taken by appellees shows that the avocado standards established by the Secretary of Agriculture are enforced by competent and independent inspection of all avocados handled at appellants' packing plants and at the plants of other handlers of Florida avocados. [Vol. II of Record.]

Substantial Nature of Question Presented

The jurisdictional question presented by this appeal, it is submitted, is of substantial importance in its bearing upon the functioning of the federal courts. The question is magnified in importance when it relates to exercise by a federal court of jurisdiction in a case wherein it is claimed that a state statute operates as a restriction upon the free flow of commerce among the states. To the august court that decided *Minnesota v. Barber*, 136 U. S. 313, *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, *Best & Co. v. Maxwell*, 311 U. S. 454, and *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525,* it need not be stressed that a principal objective of the Constitution of the United States is to protect interstate commerce from state re-

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*Also, *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533; *McLeod v. Wisconsin*, 228 U. S. 115; *Cleveland Butter Co. v. Patterson*, 315 U. S. 148; *Rice v. Santa Fe Elevator Corporation*, 331 U. S. 218; *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 388-390; *Castle v. Hayes Freight Lines*, 348 U. S. 61.

striction, no matter by what device, and that a principal function of the federal courts is to ban such restriction. So zealous is this national policy that when it is claimed that a state statute, by its practical operation, interferes with an enactment by Congress to promote and regulate interstate commerce, the federal courts are vested with jurisdiction of such claims without allegation or proof of the amount or value involved.

It is a flaunting of the national will as expressed in the Judicial Code for a federal court to decline exercise of jurisdiction in a case in which a judicial remedy is sought of the kind provided for by sections 1331 and 1337. To say that the "past events" leading to the institution of this action do not present a justiciable controversy, a case for a declaration of rights and injunctive relief if needed, and to remit appellants to a vacuous administrative proceeding in the state courts of California in a case involving no administrative issue, is a palpable evasion of duty by a federal court. (Discussion of federal court jurisdiction in the opinions in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U. S. 341.)

By thorough practical demonstration, appellants have established that enforcement against them of section 792 of the Agricultural Code of California is in various respects a continuing and substantial commercial detriment; that it restricts their access to the prime market for avocados in the United States, a market in which there is large demand for their fruit; that it thwarts the purpose and plan of Congress, by the Agricultural Marketing Agreement Act, to promote orderly marketing of Florida avocados, in the interest of the general national economy; that the state officers of California have by their past acts evidenced a persistent intention to continue

to enforce the challenged statute so long as it remains in force and avow such intention in their pleadings in this case. For the direct and indirect loss to appellants by the 8% oil blockade maintained in California against most Florida avocados there is no possible recovery of damages. The detriment is real, substantial, immediate and continuous, and increases in extent as the avocado trees planted in Florida in recent years come into fruition.

Respectfully submitted,

ISAAC E. FERGUSON,
Attorney for Appellants.

APPENDIX I

Opinion of District Court

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, Defendants. Civil No. 7648.

MEMORANDUM AND ORDER

This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U. S. C. A. §§2281 and 2284.

Plaintiffs are Florida growers and packers of avocados and, concededly, are engaged in the interstate marketing of their product. They complain of the barrier which certain portions of the California Agricultural Code assertedly presents to the importation of their product into the State of California.

Division 5 ("Standardization"), Chapter 2 ("Fruit, Nut and Vegetable Standards"), of the California Agricultural Code, sets out a comprehensive system of packing, marketing and quality control of agricultural products including, *inter alia*, avocados. Plaintiffs first encounter this control as their fruit enters California, inspection being had at the familiar argicultural inspection stations located at the border wherever a highway enters the State (§782.6).[1] There the load is sampled (§782), and if

[1]All references in this opinion to sections are to sections of the Agricultural Code of the State of California unless otherwise specifically noted.

the fruit fails to meet the standards imposed by any pertinent section of the Agricultural Code (§785), the load is tagged as nonconforming fruit. Such noncomplying fruit is declared a nuisance and, if not reconditioned, is subject to seizure and eventual abatement as a nuisance (§785).

Reconditioning would involve, here, the substitution of qualified fruit for that found lacking, when weighed against the standards fixed by Chapter 2. The specific standard of which plaintiffs complain is that found in §792, which requires that all avocados contain not less than 8% oil by weight, excluding the skin and seed.

Plaintiffs allege that the variety of avocado grown by them in Florida differs from those grown in California in that they inherently possess a lesser percentage of oil by weight than those cultivated in California; that the varieties which they would introduce into California seldom meet the oil test of §792 at the time when they are in prime marketing condition.

It is further alleged that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standard imposed by §792, and that those nonconforming loads were not reconditioned by substitution, but were removed from the state and marketed elsewhere (§785).

On the above stated facts, plaintiffs ask this court for certain declaratory and injunctive relief. Such relief cannot be granted as this court lacks jurisdiction of the cause.

The basic rule is that this court is a court of limited jurisdiction, and has no authority beyond that specifically granted it by law. The jurisdiction of this court is never presumed. The presumption is to the contrary (Lehigh Mining & Manufacturing Co. v. Kelly, 160 U. S. 327; United States v. Green, 107 F. 2d 19; and Durkey v.

Arndt, 46 F. Supp. 256). The first principle of federal jurisdiction is that it is the duty of litigants to make clear to the court the basis of its jurisdiction over the proceeding. Likewise, it is the duty of the court to make sure that jurisdiction exists. If federal jurisdiction is not apparent, the court not only will, but must, refuse to proceed with the determination of the merits of the controversy, unless this failure can be cured. This is true regardless of what stage the case may be in, and whether the defect is called to the court's attention by suggestion of the parties, or otherwise (Mansfield, C. & L. M. Railway Co. v. Swan, 111 U. S. 379; Warner v. Territory of Hawaii, 206 F. 2d 851; Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623; Skelly v. Dockweiler, 75 F. Supp. 11; and American Distilling Co. v. City of Sausalito, 73 F. Supp. 520).

The jurisdiction of a federal district court finds its initial limitation in the ultimate source of the court's authority, namely, the Constitution of the United States. A matter, to be justiciable, must be capable of categorization as either a "case" or a "controversy" (United States Constitution, Art. 3). While a wide variety of forms of action and remedies are permissible, the complaint—as a constitutional prerequisite to the assumption of jurisdiction by a federal court—must show that the case presents for determination *an existing dispute as to present legal rights.* When this is not affirmatively shown, the case must be disposed of as provided by the Federal Rules of Civil Procedure, §12(h)(2), where it is decreed that, ". . . Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual con-

troversy could arise only if there were a co-existence of four facts, namely:

1. The bringing of avocados to California by plaintiffs;

2. The failure of avocados to meet the standards fixed by law;

3. The refusal of the plaintiffs to recondition or remove the avocados; and

4. An election by plaintiffs to contest the abatement in the State courts as provided by §7[illegible].

This lack of a present, actual, existing controversy concludes the jurisdiction of this court (Muskrat v. United States, 219 U. S. 346). The past events on which this case is predicated are not of sufficient legal [illegible] as to here and now create justiciable issues (Aetna Life Insurance Co. v. Haworth, 300 U. S. 227). The record now before this court shows no more than a mere prospect of interference posed by the bare existence of the law in question (United Public Workers v. Mitchell, 330 U. S. 75; and Wycoff Co., Inc. v. Public Service Comm'n. of Utah, 344 U. S. 237; e.f.: Ramspeck v. Federal Trial Examiners, 345 U. S. 128). On the record now before it, this court has no authority to take jurisdiction of this case, and is left with no course other than to dismiss the action at this time.

Defendants have filed motions to dismiss this action on a variety of grounds, all of them being premised on various subsections of Federal Rules of Civil Procedure, §12. Since this case must be dismissed because of a lack

of jurisdiction, it is unnecessary to consider defendants' motions to dismiss.

IT IS, THEREFORE, ORDERED that plaintiffs' complaint and the cause of action sought to be set forth in said complaint be, and the same is, hereby dismissed.

Dated: December 17th, 1958.

ALBERT LEE STEPHENS
Chief Judge, United States Court of Appeals for the Ninth Circuit.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge.

APPENDIX II

Agricultural Code of California, Division V. Standardization*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

(Warning tag: Detachment, alteration, etc., unlawful.) The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

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*Deering's Agricultural Code of the State of California, 1953, with supplement covering legislation through 1957 session.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owner.) If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such

consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 600, §2, ch. 752, §1; Stats. 1955, ch. 431, §1.)

Section 785.6. *Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc., defined: Disposition of money recovered.* Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and

fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment in the county jail for not more than six months, or by both.

APPENDIX III

Agricultural Marketing Agreement Act of 1937*

7 U.S.C.A. Sec. 601. Declaration of conditions.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246."

7 U.S.C.A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current

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*The Agricultural Marketing Agreement of June 3, 1937 (7 U.S.C.A. sections 671-674) affirmed the validity of operative sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U.S.C.A. page 337.)

consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 401-408, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§1, 2, 49 Stat. 750, 782; June 3, 1937, c. 296, §§1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. [illegible].

7 U.S.C.A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

* * * * * * * * *

7 U.S.C.A. Sec. 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture

shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said section. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 169, Title II, §206(d), 61 Stat. 208.

7 U.S.C.A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d, 612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin). * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions

thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers.

* * * * * * * *

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

* * * * * * * *

Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.

FILE COPY

MOTION TO
DISMISS OR
AFFIRM

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted]

LIME AND AVOCADO GROWERS, INC., Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida cor-

Appellants,

v.

[illegible] VOORSEN, Director of the Department of [illegible] of the State of California, GOODWIN KNIGHT, Governor of the State of California, EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal from the United States District Court for the Northern District of California, Northern Division

MOTION TO DISMISS OR AFFIRM

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MISCELLANEOUS

[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 820

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. A. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal from the United States District Court for the Northern District of California, Northern Division

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court dismissing the case for lack of jurisdiction is reported at 169 F. Supp. 774

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal be dismissed because it is not within the jurisdiction of this court. Appellees move, in the alter-

native, to affirm on the ground that the question presented is so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

Whether this court has jurisdiction of the case under 28 U. S. C. § 1253.

Whether there exists a case or controversy under Article III, United States Constitution, cognizable in the United States District Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the California Agricultural Code, and of the California Administrative Code, are set forth in the Appendix A to appellees' motion.

STATEMENT

A district court of three judges, convened pursuant to 28 U. S. C. §§ 2281 and 2284, dismissed appellants' complaint by order entered December 17, 1958, for lack of a presently existing controversy between the parties. Appellants on February 12, 1959, filed a direct appeal from the formal judgment of dismissal entered by a single district judge on January 13, 1959.

Appellants are Florida corporations engaged in the business of marketing avocados and other agricultural products grown in Florida (Complaint, Par. I; deposition of Kendall, Tr. 159; deposition of Pixwaty, Tr. 249). In this action appellants seek a declaratory judgment and an injunction restraining the enforcement of § 792 of the California Agricultural

Code. Named as defendants are the Governor, Attorney General, and the Director of Agriculture of the State of California. Appellants have not moved for a temporary restraining order or for a preliminary injunction, nor did appellants seek leave to amend their complaint or file a petition for rehearing following the dismissal.

Section 792 of the California Agricultural Code is part of a comprehensive statutory program establishing quality and maturity standards for a large number of agricultural products (see California Agric. Code, Div. 5, "Standardization," §§ 751-11499, 3 Calif. Adm. Code §§ 1397.5-1397.60). Section 792 prescribed standards for avocados. This section provides, in relevant part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." This 8 percent oil content standard for avocados was enacted into law by the California Legislature in 1925, Ch. 350, Calif. Stats. 1925.

In their complaint appellants contend that as applied to Florida avocados marketed in California, the 8 percent oil content requirement violates the Commerce Clause and the Equal Protection Clause of the Constitution, and, further that it conflicts with the Agricultural Marketing Agreement Act of 1937 (Act of August 24, 1935, 49 Stat. 750, as amended by Act of June 3, 1937, 50 Stat. 246; 7 U. S. C. §§ 601-659) and a marketing order regulating avocados grown in South Florida, promulgated thereunder by the Secre-

tary of Agriculture (Complaint, Pars. XXVIII, XXIX and XXX; 7 C. F. R. 969).

After appellees answered the complaint, appellants by written stipulation were given permission to take depositions in Florida of their own witnesses.[1] Two of the principal depositions were those of Harold E. Kendall, President of appellant South Florida Growers Association, Inc., and Fred A. Piowaty, Assistant General Manager of appellant Florida Lime and Avocado Growers, Inc. These officers of appellant corporations submitted evidence of the business operations of appellants and the effects that California's 8 percent oil content standard had on appellants' businesses.[2]

The allegations of appellants in the complaint and the depositions of their officers reflect the following pattern of business: Between them appellants market approximately 50 percent of all avocados grown in Florida (Complaint, Par. XIV). Appellant Florida Lime and Avocado Growers, Inc., began marketing avocados in 1937 and appellant South Florida Growers Association, Inc., in 1939. Both began marketing Florida avocados in California in 1954. Since that time, avocado sales in California have represented 13.53 percent of the total avocado sales of appellant Florida Lime and Avocado Growers, Inc., and 5 percent of the total avocado sales of South

[1] The written stipulation to take depositions, signed by counsel for [illegible] dated January 9, 1958, being a part of the record on appeal, provided that the depositions were being taken for appellants' sole benefit [illegible] offered by appellants in evidence, and were not being taken for purposes of discovery.

[2] The depositions of Mr. Kendall and Mr. Piowaty are part of the record on appeal.

Florida Growers Association, Inc. Approximately 94 percent to 98 percent of the avocados shipped by appellants to California were found upon inspection to comply with § 792 of the Agricultural Code, the statute under attack. For example, appellant Florida Lime and Avocado Growers, Inc., claims that during the marketing seasons 1954-55, 1955-56, 1956-57, and 1957-58, the California authorities rejected 6,681 lug boxes of avocados—5.47 percent of the total shipped to California by this appellant (Appellants' Exhibit 21; Appellees' Exhibit S); Appellant South Florida Growers Association, Inc., claims that during the same period the California authorities rejected 641 bushels—only 1.84 percent of the avocados which it shipped to California (Appellants' Exhibits 17 and 19). No claim is made that any of the appellants' avocados were seized by California authorities, only that warning notices of noncompliance were issued (Appellants' Exhibit 22).

The few lots which failed to meet the California statutory requirements[2] were not lost to appellants, but were reshipped and sold on neighboring markets outside California. Owners of noncomplying avocados are permitted to dispose of them elsewhere without violating California law. 3 Calif. Adm. Code § 1256.2. The damages claimed by appellants from the operation of the California statute under attack are the

[2] Appellant Florida Lime and Avocado Growers, Inc., could cite only five lots of the entire four eight years which were rejected upon inspection by California authorities (Appellants' Exhibit 21, Deposition of Powell, p. [illegible]). Appellant South Florida Growers Association, Inc., claims seven lots were rejected (Appellants' Exhibit 17, Deposition of Kincaid, page 158).

reductions in anticipated revenues resulting from the reshipment and sale of the noncomplying avocados on markets in neighboring states. In the case of neither appellant was the claimed reduction in anticipated revenue significant in relation to its volume of business.[1]

In addition to transshipping to markets outside California, appellants have other alternative courses of action open to them upon receiving notice that a lot of avocados does not comply with the California statute. One is to recondition the lot by removing the noncomplying avocados from the lot. Calif. Agric. Code § 785. Another is to file a petition with the California superior court praying for an order authorizing the marketing of the avocados. Calif. Agric. Code § 785. Lastly, the appellants could decline to either recondition or transship, thus inviting the California authorities to file a petition in a state superior court requesting an order abating the avocados as a nuisance. See Calif. Agric. Code § 785. In such a proceeding, of course, appellants could raise as a defense the invalidity of the statute. They could also attack the statute by way of defense if a state court actions were brought to impose civil or criminal penalties for violation of the statute. See Calif. Agric. Code §§ 784, 785.6, 831.

Appellees filed motions to dismiss the action as to both appellants, accepting as true for the purpose of

[1] For a detailed analysis of the claimed losses of both appellants, see Points and Authorities in Support of Appellees' Motions to Dismiss, which is part of the record on appeal.

the motions the allegations of appellants' complaint and the evidence presented by their corporate officers.[5] The first ground for appellants' motions to dismiss was that appellants did not meet the "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. 582, 593) of great and immediate irreparable harm which a litigant must meet before a federal court will exercise its powers of equity to enjoin state officials from enforcing state laws, e.g., *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Douglas* v. *Jeannette*, 319 U. S. 157, 164. Other grounds for appellants' motions to dismiss were that the complaint fails to show that the matter in controversy exceeds the sum or value of $3,000 within the purview of 28 U. S. C. § 1331 and that the complaint fails to show that the action or proceeding arises under any act of Congress regulating commerce within the purview of 28 U. S. C. § 1337. Alternatively, appellees moved the court to hold the case in abeyance pending an authoritative interpretation of California law by California courts. See, e.g., *American Federation of Labor* v. *Watson*, 327 U. S. 582.

The district court dismissed the complaint on the ground that it had no jurisdiction because of the absence of a presently existing controversy between

[5] Appellants complain in their Jurisdictional Statement that to the extent that the decision of the district court is of a factual nature, it is somehow incorrect. It is, however, elemental that a motion to dismiss, like a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, may be based on pleadings, depositions and affidavits if there is no material controversy as to controlling facts. (See, U. S., *Spielman Motor Company* v. *Dodge*, 295 U. S. 89; *Ex parte La Prade*, 289 U. S. 444, 452.) Significantly, appellants cite no specific factual basis of the decision below which they claim to be erroneous. (Jurisdictional Statement, p. 7.)

the parties. *Florida Lime and Avocado Growers v. Jacobsen*, 169 F. Supp. 774. The court's conclusion is summed up as follows:

> "There is no claim here at any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual controversy could arise only if there were a co-existence of four facts, namely:
>
> "1. The bringing of avocados to California by plaintiff;
>
> "2. The failure of avocados to meet the standards fixed by law;
>
> "3. The refusal of the plaintiff to recondition or remove the avocados; and
>
> "4. An election by plaintiffs to contest the abatement in the state courts as provided by Section 785 [of the California Agricultural Code]. 169 F. Supp. at 776."

If this court were to find that a justiciable controversy exists, the other jurisdictional questions raised by appellee's motions to dismiss, but not considered by the district court, would remain. One such question whether the case should be dismissed because appellants are suffering no irreparable injury is a matter of equity and would involve the exercise of discretion by the district court. *American Federation of Labor* v. *Watson*, 327 U. S. at 593; *Penn* v. *Williams*, 294 U. S. 176, 185.

ARGUMENT

I. The Motion to Dismiss Should Be Granted Because the Appeal Is Not Within the Jurisdiction of This Court.

The Judicial Code provides that only a district court of three judges may grant an injunction restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." 28 U. S. C. § 2281. The three-judge district court below was erroneously convened because appellants prayed for an injunction restraining the enforcement of the California statute in question on a ground other than its unconstitutionality. In addition to complaining that the statute is repugnant to the Commerce Clause and the Equal Protection Clause of the Constitution (Complaint, Pars. III, XXIX, XXX), appellants asserted a conflict between the state statute and a federal statute, the Agricultural Marketing Agreement Act of 1937, Act of August 24, 1935, 49 Stat. 750, as amended, Act of June 3, 1937, 50 Stat. 246; 7 U. S. C. §§ 601-659 (Complaint, Pars. IV and XXX). See *Parker* v. *Brown*, 317 U. S. 341. This court has held that if one of the grounds for an injunction against the enforcement of a state statute is its asserted conflict with a federal statute, the case is not a proper one for decision by a three-judge district court. *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50; cf. *Ex parte Buder*, 271 U. S. 461.

Since the suit is not one that is required to be heard by a three-judge court, a direct appeal to this court may not be taken under 28 U. S. C. § 1253. *Stainback*

v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Phillips* v. *United States*, 312 U. S. 246; *Oklahoma Gas & E. Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16. If a three-judge court is erroneously convened and enters a final order, the appeal must be taken to the appropriate court of appeals. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. at 380-381; *Phillips* v. *United States*, 312 U. S. at 254; *Oklahoma Gas & E. Co.* v. *Oklahoma Packing Co.*, 292 U. S. at 393; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50. The appeal must, therefore, be dismissed.[1]

II. The Judgment of the District Court Should Be Affirmed Because the Questions Are So Unsubstantial as Not to Need Further Argument.

The decision of the district court is plainly correct. There is no justiciable "controversy" under Article III of the Constitution unless the plaintiff's suit against public officers shows a threatened invasion of his substantive legally protected rights. *Pacific Likens Steel Co.*, 310 U. S. 113, 125. As Mr. Chief Justice Hughes said in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240-241:

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific re-

[1] Unlike *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, [illegible] appeal, which lies to the Court of Appeals for the Ninth Circuit, [illegible] Section 28 U. S. C. [illegible] There is no statutory authorization for review of a district court [illegible]

lief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Appellants' case is too contingent and speculative to meet this test of justiciability. Appellants are in much the same position as the federal employees in *United Public Workers* v. *Mitchell*, 330 U. S. 75, who sued to enjoin the Civil Service Commission from enforcing the Hatch Act and for a declaratory judgment holding the act unconstitutional. The federal employees involved, except one Poole, declared their desire to engage in political activity proscribed by the act, but had not actually done so. The court held that no case or controversy existed because the absence of actual violations rendered the threat of dismissal or discipline to be hypothetical, not actual.

Similarly, appellant corporations merely declare their desire to market avocados in California which may not comply with California law. They have not actually done so. They have in the past successfully sold a very high percentage of their avocados in California markets and have reshipped the few lots that did not meet the California standard to neighboring western markets. No threatened interference with appellants' rights appears beyond that implied by the existence of the statute. A general threat that officers will enforce the laws they are charged to administer is not sufficient to create a justiciable controversy. *United Public Workers* v. *Mitchell*, 330 U. S. at 88.

The position of appellant corporations is in sharp contrast with the position of the plaintiff in *Doud* v. *Hodge*, 350 U. S. 485, a case relied on by appellants in their Jurisdictional Statement. In *Doud* v. *Hodge* the plaintiffs' business consisted exclusively of selling and issuing money orders in the State of Illinois, through such agents as retail drug, hardware and grocery stores. The entire business was regulated by the statute in question, and plaintiffs could not conduct their business operation without violating the statute. This court reversed the district court which was clearly in error in deciding that it had no jurisdiction because the state courts had not rendered a definitive decision as to the meaning and federal constitutionality of the state statute.

By contrast with the plaintiffs in *Doud* v. *Hodge* appellants can—indeed, always have—operated their entire business without violating the California statute they seek to have declared unconstitutional. The picture presented, even when stated favorably to appellants, is as follows: In one of their markets—California—appellants have marketed a substantial volume of one of their products—avocados—but hesitate to increase that volume with fruit that does not meet the 8 percent oil test. That appellants' case looks to possible future controversy and not to presently existing facts is suggested by the detriment they anticipate as "avocado trees planted in Florida in recent years come into fruition" (Jurisdictional Statement, p. 15). Neither appellant, nor any other Florida handler, has made any commercial shipments of Florida avocados

to California for the past year (Affidavit of Whipple, Exhibit A to Appellees' Opposition to Appellants' Motion to Amend Complaint).

Appellants' case is equally distinguishable from *Evers* v. *Dwyer*, 358 U. S. 202, also relied on by appellants. The plaintiff in *Evers* v. *Dwyer*, a Negro, immediately violated the Memphis segregation ordinance at the moment he seated himself in the front portion of the public bus. At this point the justiciable controversy came into existence. The facts which would form the basis of the litigation were fixed and would never be more concrete. Regardless of how many times the plaintiff boarded a Memphis bus, his racial identity under the ordinance would be unchanged.

Appellant corporations, on the other hand, have not violated the California law. Moreover, there are no concrete facts to shape a justiciable dispute because appellants have reshipped to other markets the few lots of avocados which have failed to meet the 8 percent oil standard. Appellants seek to enjoin the enforcement of the California statute as to future shipments. But it is a matter of speculation whether the avocados in such future shipments will have insufficient oil content under the statute. Certainly appellants' past experience indicates a high probability that future shipments will be marketed freely in California (*supra* at p. 5). Only if appellants refuse to either tranship or to recondition a specific lot which fails to meet the statutory standard, thereby giving

rise to a specific dispute with the state or county agricultural inspectors, will the facts be as concrete as in *Evers* v. *Dwyer*.

Realistically, appellants are seeking to establish a defense against a cause of action which they fear the appellees may in the future assert against them in the California courts if appellants ever violate the California law, cf., *Public Service Comm'n.* v. *Wycoff*, 344 U. S. 237, 248. It is not the action of the appellee state officials, but the appellants' fears, which prevent their marketing of avocados in California. As said by Mr. Justice Brandeis in *Willing* v. *Chicago Auditorium*, 277 U. S. 274, 289-290, "The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action."

An affirmance will not have immediate importance beyond the particular facts and parties involved. The actual, practical effect of affirmance will be to require appellants to commence marketing avocados in California of less than 8 percent oil content, should they desire to test the California law. Should a county agricultural commissioner or a state inspector seize or otherwise interfere with such marketing, an actual controversy involving a fixed factual situation will exist, and appellants will have available to them ample legal remedies to test the validity of the statute.

CONCLUSION

The appeal should be dismissed, or alternatively, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject

to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance.

The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner."

California Agricultural Code, Section 785.6:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such non-complying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

California Agricultural Code, Section 792:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado including the skin and seed: Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injury, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

California Agricultural Code, Section 831:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five

hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

California Administrative Code, Title 3, Section 1366.2:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location: (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or remarked, whichever is necessary to provide com-

pliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

California Administrative Code, Title 3, Section 1397.5:

"*Avocados, Determination of Oil Content.* The method of determining oil content in avocados shall be the method as described in the 'Official Method for the Determination of Oil in Avocados', issued by the Bureau of Chemistry of the State Department of Agriculture, and published in the 1st quarterly, 1955 Bulletin of the State of California, Department of Agriculture, Volume XLIV, Number 1."

California Administrative Code, Title 3, Section 1397.6:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpose of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better. (Rev. 5-57)"

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OFFICIAL METHOD FOR THE DETERMINATION OF OIL IN AVOCADOS

(Revised 1954)

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Bureau of Chemistry, California Department of Agriculture

Section 792 of the Agricultural Code of the State of California provides, in part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." The maturity of an avocado is of considerable importance: an avocado of insufficient maturity is likely to shrivel and rot while softening and will lack the desirable flavor found in more mature fruit. Appraising the maturity of an avocado by visual inspection is of some importance but even expert judgment fails in many instances. Factors considered in such inspection are general ground color, number and nature of surface spots, conditions of stem, and when cut the thickness and color of seed coat and condition of seed. Growing conditions in the orchard at time of picking are of some importance, too.

The primary standard method for measuring the oil in avocados is by ethyl ether extraction from the dried avocado pulp in a Soxhlet extractor. This method is time-consuming and involves direct weighing of the oil. In 1928 Lesley and Christie[1] described a shorter method, calibrated against results obtained by ether extraction, for more rapid determination of

the oil content of avocados. This method involves grinding the fresh avocado pulp with Halowax oil (technical monochloronaphthalene) and measuring the refractive index of the avocado oil and the Halowax oil mixture. The index thus obtained is given meaning by a parallel determination of oil content by actual ether extraction. By obtaining a series of such values and constructing a graph each small change in refractive index could be represented by the proper change in percent oil.

The work of Lesley and Christie[1] was brief and rather incomplete. In 1949 A. F. Shannon[2], after considerable work and research in collaboration with a Bureau of Chemistry Staff member, revised the oil content-refractive index chart published in *The Bulletin*[2] and this appears now as Table 1 in this publication. The method established for ether extraction is also described in the A. F. Shannon paper[2].

Apparatus and Solutions Required

Portable food chopper with nut butter cutter (fine) blade or Acme Safety Grater
Power grinder, type Figure (1) or type Figure (2) [illustrations omitted]
Grinding Shell with two steel balls
Spatula (small)
Knife, three-inch blade
Pipette, 5 ml. (all glass automatic type may also be used)
Filter paper (soft), drip coffee maker type
Halowax oil No. 1000, Fisher Scientific Company or equivalent
Ethyl ether
Tweezers

Abbe type refractometer and attachments (water circulated)
Lens light or suitable instrument light
Large watch glass or pie tin
Balance, sensitive to 10 milligrams, capacity 5 to 100 grams
Small electric heater or hot water bath

Halowax Oil. The index of refraction of different lots of Halowax oil may vary as much as 0.002 and may also change with age or exposure to light. The index of refraction of each lot used should be obtained and corrected to 25 degrees C., as described below under "Calculation—Halowax Oil Correction."

Power Grinders. The later type grinder shown in Figure 1 [illustration omitted] has faster action than grinders formerly used and an operating time of 10 minutes has been found sufficient for the hardest fruits encountered. If the type in Figure 2 [illustration omitted] is used, 15 minutes operation is recommended.

Grinding Shells. Shell material of monel is preferred; steel balls should be well seated at the ends of cylinder. The cylinder seals must be protected from damage and reground when necessary to form an excellent seal. The steel balls should be one-eighth inch less in diameter than the shell cylinder. Complete specifications for construction of grinding shell may be obtained from California Department of Agriculture.

Preparation of Sample

Sample Preparation Using Portable Food Chopper. Dice to about one-half inch cubes the entire fruit excluding the skin, seed and seed coat. This may be facilitated by first quartering the fruit lengthwise. After thoroughly mixing the cubes, transfer all or a portion (size of fruit determining) of the mass slowly through a clean and dry food chopper. Careful operation will prevent juices from being lost. Collect the pulp on a pie tin or suitable dish. Thoroughly mix the pulp and as rapidly as possible weigh 5 grams to the nearest 10 milligrams on a piece of soft filter paper in a weighing dish. Filter papers used in drip coffee makers are satisfactory. Transfer the weighed sample together with filter paper into the special grinding shell containing one ball bearing. Wipe the weighing dish with a piece of soft filter paper and place this into the shell, followed by the second ball bearing. Pipette exactly 5 ml. of Halowax oil into the shell. Keep shell in vertical position until cap is fastened tightly with wrench to avoid leakage.

Sample Preparation Using Acme Safety Grater. Clean and dry the grater. Cut the avocado lengthwise into homologous (mirror image) halves. A portion of the skin and seed coat on one-half along the larger perimeter is removed and the cut face pressed and moved in a rotary manner across the grater until a fair amount of the avocado pulp is collected on a pie tin or suitable dish below. Always see that depth of grating is equal from stem to calyx end of half-section. After thoroughly mixing the pulp, weigh 5 grams, transfer to the grinding shell, and add exactly 5 ml. Halowax oil as described in the preceding paragraph.

Treatment of the Five Gram Sample in Shell

Clamp the shell containing the 5 gram sample and 5 ml. Halowax oil into the power grinding machine. Operating periods for the different types of shaker devices differ but in any case the resulting paste formed in the shell should be a smooth uniform paste. Upon any evidence of incomplete maceration the sample should be discarded. Large chunks in the weighed pulp may often cause this condition.

Transfer the bulk of the mixture by means of a small spatula to a pie tin or large watch glass and squeeze out the liquid by pressing and kneading with the spatula. The separation is facilitated by gently heating for a short period on a hot water bath. Extended heating must be avoided because Halowax oil is appreciably volatile at the temperature of a hot water bath.

Cool the oil mixture and transfer a few drops to the refractometer prism. Avoid touching hard objects to the prism surface. Follow operating instructions for make of instrument used. Refractometer temperature should have been previously stabilized to 25 degrees C. by means of water circulating through the instrument. A constant temperature circulating system is convenient if available.

Read the index of refraction of the Halowax oil mixture to the fourth decimal figure.

Calculations

Temperature Correction: If the reading is taken at any temperature other than 25 degrees C. a correction must be applied by adding 0.0004 for every full degree above 25 degrees C. or subtracting 0.0004 for every degree below 25 degrees C. Fractions of a degree

to the nearest one-fourth should be compensated accordingly.

Halowax Oil Correction: If the index of refraction of Halowax oil used is less than 1.6353 the difference is added to the reading on the sample; if greater the difference is subtracted from the refractometer reading. The resulting figure is "corrected refractive index." With use of this corrected reading obtain the percent oil in avocado from the table.

Sample Calculation

Reading obtained on refractometer at 24.5 degrees C. = 1.6155
Temperature correction = —0.0002
Reading corrected to 25 degrees C. = 1.6153
Index of refraction of Halowax oil used corrected to 25 degrees C. = 1.6348
Standard correction = (1.6353 — 1.6348) = 0.0005 to be added
Final "corrected refractive index" = (1.6153 + 0.0005) = 1.6158

Reference to Table 4 shows this figure corresponds to 12.1 percent oil in the avocado under examination.

Cleaning of Refractometer

The prism surfaces of the refractometer should be cleaned after each determination by first wiping gently or blotting with either lens paper, clean cotton, or softest facial tissue; then clean with another piece soaked in ether and finally wiping clean with a third piece such that the surface of the measuring prism appears bright.

CHANGE IN REFRACTIVE INDEX OF HALOWAX OIL CAUSED BY THE AVOCADO OIL EXTRACTED
(Based on Halowax Oil No. 1.6353 at 25 Degrees C.)

Corrected refractive index	*Percent oil*	*Corrected refractive index*	*Percent oil*	*Corrected refractive index*	*Percent oil*
1.6281	4.0	1.6218	8.0	1.6159	12.0
.6280	4.1	.6216	8.1	.6158	12.1
.6278	4.2	.6214	8.2	.6157	12.2
.6277	4.3	.6213	8.3	.6155	12.3
.6275	4.4	.6211	8.4	.6153	12.4

Corrected refractive index	*Percent oil*	*Corrected refractive index*	*Percent oil*	*Corrected refractive index*	*Percent oil*
.6273	4.5	.6210	8.5	.6152	12.5
.6272	4.6	.6208	8.6	.6151	12.6
.6270	4.7	.6207	8.7	.6149	12.7
.6269	4.8	.6205	8.8	.6148	12.8
.6267	4.9	.6204	8.9	.6146	12.9
1.6265	5.0	1.6202	9.0	1.6145	13.0
.6264	5.1	.6201	9.1	.6143	13.1
.6262	5.2	.6199	9.2	.6142	13.2
.6260	5.3	.6198	9.3	.6141	13.3
.6259	5.4	.6196	9.4	.6139	13.4
.6257	5.5	.6195	9.5	.6137	13.5
.6255	5.6	.6193	9.6	.6136	13.6
.6254	5.7	.6192	9.7	.6135	13.7
.6252	5.8	.6190	9.8	.6133	13.8
.6250	5.9	.6189	9.9	.6132	13.9
1.6249	6.0	1.6187	10.0	1.6131	14.0
.6247	6.1	.6186	10.1	.6129	14.1
.6245	6.2	.6184	10.2	.6127	14.2
.6244	6.3	.6183	10.3	.6126	14.3
.6243	6.4	.6182	10.4	.6125	14.4
.6241	6.5	.6180	10.5	.6123	14.5
.6239	6.6	.6179	10.6	.6121	14.6
.6237	6.7	.6178	10.7	.6120	14.7
.6236	6.8	.6176	10.8	.6118	14.8
.6234	6.9	.6175	10.9	.6117	14.9
1.6232	7.0	1.6173	11.0	1.6116	15.0
.6231	7.1	.6172	11.1	.6115	15.1
.6229	7.2	.6171	11.2	.6113	15.2
.6228	7.3	.6169	11.3	.6111	15.3
.6226	7.4	.6168	11.4	.6110	15.4
.6225	7.5	.6166	11.5	.6109	15.5
.6223	7.6	.6165	11.6	.6107	15.6
.6222	7.7	.6163	11.7	.6106	15.7
.6220	7.8	.6162	11.8	.6105	15.8
.6219	7.9	.6161	11.9	.6103	15.9

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(1) B. E. Lesley and A. W. Christie, Ind. Eng. Chem. Anal. Ed., Vol. 1, No. 1 (1929) p. 24.

(2) A. F. Shannon, Bulletin, Calif. Dept. of Agriculture, Vol. XXXVIII, No. 3, (1949) p. 127.

(3) Bulletin, Calif. Dept. of Agriculture, Vol. XXXVI, No. 1, (1947) p. 20.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 49

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the District Court of the United States for the Northern District of California, Northern Division

ANSWER TO MOTION TO DISMISS OR AFFIRM

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IN THE

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October Term, 1958

No. 820

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the District Court of the United States for the Northern District of California, Northern Division

ANSWER TO MOTION TO DISMISS OR AFFIRM

I.

Jurisdiction of This Court Under 28 U.S.C. §1253

The appellees urge that the appeal is not within the jurisdiction of this court because a three-judge district court was erroneously convened to hear the case. No objection was made by appellees to the convening of a three-judge court, nor to the hearing by a three judge-court of appellees' motion to dismiss the complaint. Let alone the

incongruity of an attack by appellees on the composition of the court whose judgment they seek to sustain, the contention is groundless.

Parker v. Brown, 317 U.S. 341, is cited. A three-judge district court held that a marketing program for California raisins, adopted under the California Agricultural Prorate Act of 1940, was an illegal interference with interstate commerce and enjoined enforcement of the program. On direct appeal to this court, the judgment was reversed. There was no question either of the jurisdiction of the district court or of the jurisdiction of the appeal. One contention of the plaintiff was that the California statute was in conflict with the Agricultural Marketing Agreement Act of 1937. A like contention is made in the present case with respect to section 792 of the Agricultural Code of California. When the California Prorate Act was adopted no stabilization program for raisins had been put into effect by the Secretary of Agriculture under the Marketing Agreement Act of 1937. This court said (317 U.S. at p. 353): "We may assume also that a stabilization program adopted under the Agricultural Marketing Agreement Act would supersede the state act."*

Brief comment on the remaining cases cited by appellees is submitted:

Lemke v. Farmers' Grain Co., 258 U.S. 50: Appeal from judgment of Court of Appeals entertained by Supreme Court, after appeal to that court from judgment of three-judge district court; held that in one phase of the

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**Parker v. Brown* has significant bearing upon the merits of the present case, as appears from the analysis of this court's decision made by M. Ramaswamy in his treatise on "The Commerce Clause in the Constitution of the United States," pp. 259-268.

case the constitutionality of the state statute in question was not involved, therefore the case was appealable to the Court of Appeals and then from that court to the Supreme Court. In the companion case of *Lemke v. Homer Farmers' Elevator Co.*, 258 U.S. 65, wherein a three-judge district granted an injunction against enforcement of the state statute, there was a direct appeal to this court and the judgment was affirmed.

Stainback v. Mo Hock Le Lok Po, 336 U.S. 368: Provisions for hearing by three-judge district court, with direct appeal to Supreme Court, held not applicable to the territorial District Court of the United States for the District of Hawaii.

Ex parte Bûder, 271 U.S. 461: No state statute assailed as repugnant to the United States Constitution.

Phillips v. United States, 312 U.S. 246: A three-judge district court was not called for by a claim that the Governor of Oklahoma unlawfully declared martial law in a designated area to stay construction of a dam by Grand River Dam Authority, an agency of the State of Oklahoma. The attack was upon the governor's alleged lawless exercise of authority, not upon the constitutionality of a state statute.

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386: Not a suit to restrain enforcement of a statute or administrative order by state officers, but only to circumvent action by Oklahoma Packing Co. to recover alleged excess payment for gas, pursuant to an order of the State Corporation Commission directing the gas company to supply gas at a prescribed rate. The order was no longer in effect and no relief was sought against the state officers joined as defendants.

Gully v. Interstate Natural Gas Co., 292 U.S. 16: Assessments were proposed to be made against certain property claimed to be exempt, under a statute authorizing assessments against taxable property that in past years had escaped taxation. A three-judge district court granted an injunction against enforcement of the assessment. *Held*: that there was no question of the constitutionality of the statute, since it authorized assessments only of property that was taxable; and further, that an assessment is not an order of an administrative board or commission, therefore this was not a case for hearing by a three-judge court and direct appeal to the Supreme Court.

Manifestly, no case cited by appellees gainsays jurisdiction of this appeal under 28 U.S.C. §1253.

II.

Existence of Justiciable Controversy

Appellees urge that an adjudication is sought by appellants on a hypothetical question. There is nothing hypothetical about appellants' case. It brings to court an existing tangible controversy that has arisen out of the exigencies of the growing commerce in avocados. The actual experience of appellants has demonstrated that the California statute alleged to contravene the Constitution of the United States substantially interferes with the free flow of interstate commerce in avocados; horticultural research of recent years has established that California's barrier against sale in that state of avocados with less than 8% oil content, as applied to the varieties of avocados grown in Florida, is not a valid standard of maturity or quality. No matter by what motives and assumptions this legislative mandate was originally inspired, the appellants claim, it has come to operate as an arbitrary and inde-

fensible embargo against the sale in California of the Florida avocados of which appellants are handlers.

The actuality of this interference with interstate commerce is concretely revealed by the complaint, answers to interrogatories, oral depositions and documentary exhibits in the record of this case. The persistent attempts of appellants to meet the demand for their avocados in the important California market, in face of the restriction and danger of loss imposed by the 8% oil content requirement, manifests the commercial urgency of access to this market. This need grows more compulsive with the increase of Florida's avocado crop and the sharpening of competition between the Florida fruit and that of California.* At the same time, because the biochemical characteristics of Florida avocados are immutably determined by the native climatic and soil conditions, it is certain that these characteristics will persist, in particular the low ratio of oil content. That the continued enforcement of California's 8% oil content requirement for sale of the fruit in that state will subject the Florida avocados to the same commercial detriment as heretofore experienced is beyond question. To delay judicial consideration of the constitutionality of the challenged California statute, as applied to Florida-grown avocados, is merely to prolong a parochial barrier against sale of mature and wholesome Florida avocados in the principal market for this fruit in the

*Reference is made in appellees' motion (pp. 12-13) to a statement in an affidavit made by S. R. Whipple February 5, 1949, after decision on appellees' motion to dismiss the complaint, that no shipments of avocados grown in Florida had arrived in California from March 1, 1958 to February 5, 1959. No response to this affidavit was deemed necessary by appellants at the time it was filed. It is noted that the 1957-1958 crop of Florida avocados was disposed of by March 1, 1958, and that the winds and frosts of early 1958 decimated the 1958-1959 crop.

United States, with consequential detriment to the marketing of this fruit in competition with the California-grown fruit in all other states.

In *United Public Workers v. Mitchell*, 330 U.S. 75, cited by appellees, it was held as to the appellants other than Poole that the complaint alleged only a desire to engage in political activities prohibited by the Hatch Act, leaving to surmise what public statements they proposed to make and the circumstances of publication. Here there is no such uncertainty or call for surmise. The avocados proposed to be shipped by appellants for sale in California are those preponderantly grown in Florida, avocados that attain maturity with less than 8% oil content, as determined by scientifically valid maturity standards. Furthermore, since the adoption in 1954 of the federal program for the marketing of Florida avocados, and so long as this program remains in effect, the avocados to be marketed by appellants in California must necessarily be in compliance with the maturity and quality standards established by the orders issued by the Secretary of Agriculture pursuant to the authority vested in him by the Agricultural Marketing Agreement Act of 1937. That such avocados, shipped to California, will be tagged as nonconforming and destroyed as a public nuisance unless removed from the state, remains certain so long as section 792 of the California Agricultural Code continues to be enforced. This is no "hypothetical fear," but an actuality evidenced by costly experience. A concrete legal remedy is applicable, a declaration of unconstitutionality of the state law as applied to appellants' shipments of avocados as aforesaid and if needed an injunction restraining such further enforcement.

In *Public Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, wherein it was held that respondent's action for

declaratory judgment should be dismissed, the several reasons for this holding are inapplicable to the present case. Wycoff Co. held a certificate of authority from the Interstate Commerce Commission for the transportation of moving picture films and newsreels from Salt Lake City to points in Utah, Idaho and Montana and sought an adjudication that its carriage of films between points within the state of Utah constituted interstate commerce because integrated with the interstate movement of the films. Such adjudication was desired not because of any action theretofore taken by the Utah Commission to subject the transportation to regulation by the Commission, but to forfend against anticipated future action. This court said that there was no evidence of any past, pending or threatened action by the Commission touching the business of the respondent in any respect, nor any showing of what action the Commission might take under a specific set of circumstances. Quoting from the opinion at page 244: "The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step." And at page 245: "This dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us."

The present case, by contrast, deals with a statutory mandate that leaves no leeway for interpretation and that has been enforced against appellants over the course of

several years and, is certain to continue to be enforced in the same manner if not enjoined. The detrimental effect of such enforcement upon the marketing of Florida avocados is indicated by the allegations of the complaint and the depositions ready to be offered in evidence by petitioners. Also shown is the conflict with the federal program for the marketing of the Florida avocados involved in continued enforcement of the challenged statutory provision. The declaration of rights sought by appellants is precisely set forth in the prayers of the complaint, likewise the injunctive relief to follow such declaration. In every respect, it is submitted, the present case meets the requirements for declaratory judgment stated in the decisions of this court.

III.

Substantiality of Complaint

Appellees argue that appellants' claim is insubstantial because only a small percentage of the avocados shipped by appellants to California has been barred from sale in that state; also because loss to appellants is avoidable by "reconditioning" rejected loads.

Ignored entirely is the restriction of appellants' shipments to California to the minor part of the Florida avocados that may at times attain 8% oil content. The total volume shipped to California is swelled by the adventitious experience of the appellant Florida Lime and Avocado Growers, Inc. in the 1954-55 season. In that season, as appears from PX 20, this appellant shipped to California 12,681 bushels of avocados out of a total of 47,954 bushels handled and, so far as ascertained when depositions were taken in Miami, all of these shipments passed the California oil test. However, as testified by Fred Pioway

(Depositions, p. 260), the oil tests then made were of a composite sample, so that the result was automatically an average of the avocados making up the sample. In the subsequent seasons the testing has been of the sample fruits individually and failure even of a single avocado to meet the oil test could result in condemnation of the whole load as nonconforming.*

No doubt encouraged by the 1945-55 experience, Florida Lime and Avocado Growers, Inc. shipped to California 10,806 bushels of avocados out of the total of 59,543 bushels handled in the 1955-56 season (PX 20), with the disastrous results shown in exhibit 21 and the oral testimony of Fred Plowaty. (Depositions, 255-256, 274.) In the next two years, the avocado shipments of said appellant to California dwindled to 3,415 and 2,538 bushels.

Since the federal marketing agreement for Florida avocados became effective June 11, 1954, the Secretary of Agriculture has assigned permissible picking dates for each of 45 named varieties of Florida avocados. Only one of these varieties, the Lula, attains 8% oil content in volume sufficent for shipment to California, although at least a dozen other varieties are produced in volume substantial enough for such shipments, if not precluded by the California oil test. But even as to the Lula avocados, 8% oil content is not attained until late in the marketing

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*Plaintiffs' exhibits 21 and 22 furnish a striking illustration. Out of a load of 1874 boxes of avocados shipped by Florida Lime and Avocado Growers, Inc. to California on November 15, 1957, of which 900 boxes were consigned to Williams and Sons Produce Co. at Los Angeles, the sizes 16s and 18s unloaded at Los Angeles, totaling 361 boxes, were tested as separate lots and tagged as nonconforming, although the five 16s used as samples averaged 8.59% oil content and the five 18s averaged 8.29%.

season, and then never with the certainty and consistency to assure passing of the California oil test and delivery to a buyer at scheduled time.

As to the suggested "reconditioning" of a load of Florida avocados tagged in California as nonconforming for lack of 8% oil content, appellees say repeatedly that this can be done by removing the nonconforming fruits. Unfortunately, the suggestion is vacuous. First, there is no warrant in section 792 of the Agricultural Code of California, or in the administrative regulations, for repeated oil tests of the same lot of avocados after removal of the samples tested and found to be nonconforming. Second, whatever may be true of other produce, or of other grounds of failure to meet statutory standards, oil content of avocados cannot be determined visually but only by maceration and laboratory test, as set forth in appellees' motion at pp. 24-30, and it is not indicated how "nonconforming" fruits can successfully be chosen for removal by any other procedure. Third, even if a local grower could go back to his nearby grove with a wagon load of avocados rejected for failure to meet the oil test and visually determine what fruits to remove and what other fruits to substitute for a new oil test, such procedure is not available to a grower or handler who sends a refrigerated truckload of Florida avocados across the continent to California.

Equally vacuous is the suggestion that section 385 of the California Agricultural Code affords effective remedy in case of rejection in California of a shipment of Florida avocados. All that is provided by section 385, with respect to perishable fruit such as avocados, is procedure for immediate destruction of the fruit tagged as nonconforming unless it can be forthwith "reconditioned." Contrary to the statement made at page 6 of appellees' motion, section

385 contains no provision for the filing of a petition by the owner in the Superior Court of California for an order authorizing the marketing of avocados, or other perishable fruit. Nor could the owner of perishable fruit compel or "invite" the California authorities to file a petition in the state court for abatement of the avocados as a public nuisance. The petition authorized to be filed in the state court by the Director of Agriculture (last two paragraphs of section 385) relates only to non-perishable agricultural products. (Jurisdictional Statement, Appendix pp. 8-9.)

To promote the profitable interstate marketing of Florida avocados, in the interest of the national economy, the federal government has set up a marketing program for these avocados of the kind set forth in appellants' complaint. This program cannot effectively serve its purpose if the respondents in this case are permitted to continue to bar the Florida avocados from the most important market for avocados in this country and to keep the growers and handlers of Florida avocados at constant disadvantage in competition with the growers and handlers of California avocados. The substantiality of appellants' complaint, it is submitted, is beyond question.

Respectfully submitted,

ISAAC E. FERGUSON,

Attorney for Appellants.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 49

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

W. C. Jacobsen, Director of the Department of Agriculture of the State of California, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' BRIEF

Opinion of district court*

The opinion of the three-judge district court is reported in 169 Federal Supplement at page 774.

Grounds on which jurisdiction of this court is invoked

Jurisdiction of this court is invoked pursuant to 28 U. S. C. section 1253, providing for the direct appeal to this court from a judgment of a three-judge district court, convened pursuant to 28 U. S. C. sections 2281 and

*R. 80; also Appendix I, *infra*, Ap. 1.

2284, in an action to restrain further enforcement of a state statute alleged to contravene provisions of the federal constitution. (Notice of appeal, R. 104.)

Nature of action and statutes pursuant to which it is brought: The object of the action is to restrain further enforcement against appellants, by the state officers of California, of section 792 of the Agricultural Code of California, prescribing the standard for avocados that may lawfully be marketed in that state and providing in particular that all such avocados, at the time of picking and all times thereafter, shall contain not less than 8% of oil. (R. 10; also Appendix II, *infra*, Ap. 10.)

Appellants are handlers of avocados grown in Florida and since June 11, 1954 have been operating under a federal marketing agreement regulating the marketing of avocados grown in South Florida, then put into effect by order of the Secretary of Agriculture pursuant to authority given to him by Congress in the Agricultural Marketing Agreement Act of 1937. (Marketing Agreement Act, Appendix III, *infra*, Ap. 11; Secretary's Marketing Order No. 69, R. 19; Complaint, paragraphs IV to XIII, R. 5-9.) Appellants complain that even though most of the avocados handled by them in interstate commerce contain less than 8% oil or fat, they are as wholesome as avocados with greater oil content; that shipments of avocados in interstate commerce are made only after inspection by the joint inspection service of the state of Florida and the federal government and certification that the avocados meet the standards of maturity and quality prescribed by the Secretary of Agriculture under the federal marketing agreement; that appellants are greatly restricted in their efforts to market their fruit in California by the provision of the challenged statute barring sale in

that state of avocados with less than 8% oil content, a requirement alleged to be arbitrary and discriminatory as applied to Florida-grown avocados with less than 8% oil content. (Complaint, paragraphs XXII to XXXI, R. 12-16.)

The complaint invokes jurisdiction of the district court under both sections 1331 and 1337 of the Judicial Code (28 U. S. C. sections 1331 and 1337) and prays for a hearing by a three-judge court as provided by sections 2281 and 2284 of the Judicial Code (28 U. S. C. 2281 and 2284). (Complaint, paragraphs III, IV, XXVIII, XXIX, XXX, XXXII, R. 5, 14-17.)

Date of judgment and of notice of appeal: The judgment of the district court, dismissing the action for want of jurisdiction, was entered January 13, 1959, and notice of appeal was filed February 12, 1959 in the office of the clerk of the United States District Court for the Northern District of California, Northern Division. (R. 93, 104.)

Constitutional provisions and statutes involved: The complaint is based upon section 8(3) of article I of the United States Constitution, empowering Congress to regulate commerce with foreign nations and among the several states, and the provision of section 1 of article XIV of amendments that no state shall deny to any person within its jurisdiction the equal protection of the laws. The complaint alleges that enforcement against appellants of the challenged state statute nullifies the exercise of power by Congress to regulate interstate commerce, by enactment of the Agricultural Marketing Agreement Act of 1937, thus involving the supremacy provision of the constitution, section 2 of article VI.

The opinion of the district court refers to section 2 of article III of the constitution, stating the extent of the judicial power of the United States.

The California statutes involved are section 792 of the Agricultural Code, also the enforcement provisions, sections 784, 785 and 785.6, set forth in Appendix II, *infra*, Ap. 6-10. The federal statute involved is the Agricultural Marketing Agreement Act of 1937, Appendix III, *infra*, Ap. 11-17.

Cases sustaining jurisdiction: Appellants, in their jurisdictional statement, cited *Evers v. Dwyer*, 358 U. S. 202, 79 S. Ct. 178, and *Doud v. Hodge*, 350 U. S. 485, 76 S. Ct. 491, 354 U. S. 457, 77 S. Ct. 1344. In *Evers v. Dwyer*, an action for declaratory judgment asserting the constitutional right of the Negro plaintiffs to travel on buses without being segregated, dismissed by the three-judge district court on the ground that no actual controversy had been shown, this court entertained the appeal and reversed the judgment. In *Doud v. Hodge*, wherein the plaintiffs sought to enjoin enforcement against them of the Illinois Community Currency Exchanges Act, on the ground that it denied to them equal protection of law in violation of the Fourteenth Amendment, the three-judge district court dismissed the complaint for lack of jurisdiction and this court vacated the judgment and remanded the case to the district court for further proceedings. Additional cases sustaining jurisdiction of both this court and the district court will be cited in the argument.

Question presented for review

The question for review is whether the district court erred in dismissing the action, without a trial on the merits, for alleged lack of a present controversy cognizable by the court within its constitutional jurisdiction.

Statement of the case

In the decade preceding June 11, 1954, when the Secretary of Agriculture issued his *Florida Avocado Order 69*, under the Agricultural Marketing Agreement Act of 1937, there was a sharp increase in the commercial production of avocados in the southern counties of Florida, giving rise to urgent need for regulated marketing. To this end, the growers and handlers of the Florida avocados proposed adoption by the Secretary of Agriculture of a marketing agreement putting into effect certain provisions of the 1937 Act. Following extensive hearings, the Secretary rendered his decision in favor of the proposed marketing agreement, based upon his findings: (1) that 80% to 90% of the Florida avocados are sold in markets outside the state, and that all handling of avocados grown in the designated production area is in the current of interstate and foreign commerce or directly affects such commerce; (2) that the growers and handlers of Florida avocados have been accustomed to sell the entire production in fresh channel markets, including fruit which is immature and otherwise of poor quality, and this has tended to reduce the demand and prices for Florida avocados; (3) that the situation can be remedied by imposition of official standards of quality and maturity, under a marketing agreement and order, as a condition precedent to the marketing of Florida avocados. (Paragraphs VI and VII of complaint, R. 6; 19 FR 2418 and 2784; Order No. 69 (abbreviated from 969), R. 19, published 19 FR 3439 and 7 CFR part 969, pp. 119-131 and Suppl. pp. 14-18.)

Beginning with the 1954-55 crop year (April of 1954 through March of 1955), the Secretary of Agriculture has issued numerous orders establishing standards of ma-

turity and quality for Florida avocados. (Paragraphs VIII, IX, X and XI of complaint, R. 6-8; exhibits "B" and "C" attached to complaint, R. 24-26.) Paragraph XII of the complaint alleges:

"'All avocados handled under said marketing order No. 69 are inspected by the joint inspection service of the state of Florida and the federal government and no load of avocados may lawfully depart from the state without presentation of a certificate of such inspection, showing requisite quality and maturity under said marketing order." (R. 8.)

Interest of appellants

Appellants are engaged in business as handlers of avocados and other agricultural products grown in the southern part of Florida, the appellant Florida Lime and Avocado Growers, Inc. at Princeton, Florida, and the appellant South Florida Growers Association, Inc. at Goulds, Florida, both in Dade County. They are themselves growers of avocados and operate groves for others. As handlers, they pick, pack, ship and sell avocados for numerous other growers. They have been duly registered as handlers of avocados under the federal marketing agreement ever since it was put into force. (Paragraph XIII of complaint, R. 8; also Pl. Ex. 1 and 2, R. 319 and 320.)*

Total shipments of Florida avocados in the 1954-55, 1955-56 and 1956-57 crop years, and in the 1957-58 crop

*In the hearing on defendants' motion to dismiss the complaint reference was made to the depositions of witnesses taken by stipulation at Miami, Florida, and to the exhibits identified by these witnesses, although not formally offered in evidence.

year to January 11, 1958, aggregated 1,687,017 bushels, and of these shipments appellants handled 870,580 bushels, over 50%. (Pl. Ex. 4, 5, 7, 8, 11, 19, 20, R. 322, 324, 327, 329, 330, 438.)

Manifestly, appellants have a large interest in the unfettered marketing of Florida avocados in all available markets. Only Florida and California produce avocados commercially. California is both the largest producer and the largest consumer of this fruit. Even though its own production of avocados substantially exceeds that of Florida, California is nevertheless a highly favorable market for the Florida fruit. It is a coincidence of crucial significance in this case that most Florida avocados are ready to be marketed, under the federal standards of maturity, at the nadir of California's supply of the fruit, in the advantageous fall months when other fresh fruits are no longer abundant. Note the comparative figures of shipments of California and Florida avocados in the 1955-56 and 1956-57 crop years:*

	Entire year (bushels)	Oct.-Dec. (bushels)
1955-56:		
California—	1,187,500	146,200
Florida —	516,103	298,140
1956-57:		
California—	575,500	91,500
Florida —	360,927	199,440

The increase in commercial production of Florida avocados during the past ten years from about 100,000 bushels

*Pl. Ex. 5 and 8, R. 324, 329.

a year to over 500,000 bushels, let alone the potential further increase to 800,000 to 1,000,000 bushels a year, has brought urgent need for enlarged markets, and the advent of transportation by refrigerated trucks has made it feasible to market this perishable fruit in California and other far western states. (R. 221-222.)

Time of marketing of Florida avocados

In each year since 1954, permissible dates for shipment of Florida avocados have been fixed by regulations issued by the Secretary of Agriculture. In 1954, 1955, 1956 and 1957, permissible shipping dates were established for 45 named varieties of Florida avocados. For each of these varieties, in each year, four permissible shipping dates were specified, in accordance with attainment by the fruit of a certain minimum size, measured either by weight or diameter: an "A" date, with highest size requirement; a "B" date, with slightly lower size requirement; a "C" date, with a further drop in size requirement; a final "D" date, when the remaining fruit of the designated variety could be shipped without size restriction. (Pl. Ex. 9, summary of 1957-58 shipping dates, R. 330.)

Oil content of the fruit does not enter into the determination of maturity; instead, correlation of picking dates for each variety, in each season, with attained weight or size. As appears from the complaint and exhibits, the several varieties are characterized by wide variance in oil content. (Pl. Ex. 10, R. 340-435, hereinafter summarized.)

Principal varieties of Florida avocados

Twelve varieties account for approximately 90% of Florida's avocado crop:*

	1955-56 and 1956-57	
	bushels	% of total
Lula	269,566	28.2
Booth 8	140,838	14.6
Booth 7	108,246	11.3
Waldin	88,407	9.2
Booth 1	47,219	5.0
Taylor	40,621	4.2
Pollock	39,018	4.0
Hickson	34,910	3.6
Collinson	29,967	3.1
Booth 3	28,907	3.0
Trapp	23,575	2.5
Fuchs	15,379	1.6

In the statement that follows regarding the oil content of Florida avocados, and the time of the year when these avocados are ready to be marketed, reference will be limited to the foregoing varieties.

Oil content of Florida avocados: deposition of Dr. Roy W. Harkness

The avocado trees of Florida trace back to cuttings brought from the tropical lowlands of the West Indies and Guatemala, while those of California are derivatives of trees grown in the higher, colder, less humid regions of Mexico and Guatemala. The Florida fruit is generally

*According to volume marketed in the 1955-56 and 1956-57 crop years. (Pl. Ex. 4 and 7, R. 322, 327.)

larger than that of California, with higher water content and much lower fat or oil content. Some of the highest grade Florida avocados, at full maturity, have as little as 2% oil content, in contrast with the 25% to 30% oil content of the dominant commercial varieties of California avocados, the Fuerte and Hass. (Paragraph XXII of complaint, R. 12; also R. 183.)

The deposition of Dr. Roy W. Harkness, chemist at the Sub-Tropical Experiment Station of the University of Florida, at Homestead, Florida, was taken primarily to establish that an 8% oil reqirement as a standard of maturity or quality of avocados, when applied to the varieties of avocados grown in Florida, is scientifically indefensible, arbitrary and discriminatory. The same testimony serves to show how drastically and inescapably the California 8% oil standard inhibits the marketing in that state of Florida avocados of unquestionable maturity and quality, to the great economic detriment of the growers and handlers of the Florida fruit.

Dr. Harkness received his Ph.D. degree in physical chemistry at the University of California in 1928; did research work for the Department of Agriculture in Washington until 1935, then for Houdry Products Corporation in Pennsylvania until 1946, and since 1946 has been engaged in various chemical research projects at the Sub-Tropical Experiment Station at Homestead. One of his research projects, carried on from the fall of 1951 to January 1955, called State Project 675, had for its objective ascertainment of some means indicating when avocados would mature. (R. 176.) Dr. Harkness gave parti-

cular consideration to measure of the oil content of the fruit as a possible standard of maturity; that was the principal part of the research at first. (R. 177.) Annual statements of the progress of the research project were published by Dr. Harkness in Florida Agricultural Experiment Station Reports in the years 1952, 1953, 1954 and 1955. (R. 182.)

In the course of State Project 675, Dr. Harkness made a great many oil tests of avocados picked by himself from groves of the experiment station and various commercial groves in and around Dade County, Florida. (R. 177-178.) These oil tests were made by the method used in California. (R. 178.) Identified collectively as plaintiffs' exhibit 16 are photostats of 82 pages of the books in which Dr. Harkness kept the record of his oil tests, also a typewritten analysis of some of the oil tests prepared by Dr. Harkness for use as part of his 1955 program report. (R. 178-181, 346-435.)

The significance of these oil tests, in relation to the marketing of the fruit in California, is that most Florida avocados reach maturity and are ready to be marketed before, if ever, they attain 8% oil content. Sheer volume precludes analysis at this time of the results of all the avocado oil tests made by Dr. Harkness in course of State Project 675. A short summary is submitted of the oil tests made in the 1953-54 and 1954-55 seasons of avocados of the 12 varieties above listed. For an indication of the stage of maturity of the avocados when Dr. Harkness

made his oil tests, the permissible shipping dates for each of the 12 varieties in the 1957-58 season are noted:*

Fuchs: [*Shipping dates:* "A" June 17; "B" July 1; "C" July 15; "D" August 5.]

1953—July 8 to 17—50 tests:**—2.5% to 4.9%.

1954—June 3 to July 12—6 tests:—1.6% to 3.2%.

Pollock: [*Shipping dates:* "A" July 1; "B" July 22; "C" August 5; "D" August 26.]

1953—July 6 to August 12—74 tests:—1.6% to 3.3%.

Trapp: [*Shipping dates:* "A" July 29; "B" August 12; "C" August 26; "D" September 16.]

1953—September 16—1 test:—3.2%.

Waldin: [*Shipping dates:* "A" August 5; "B" August 19; "C" September 2; "D" September 30.]

1953—July 27 to September 22—75 tests:—2.1% to 6.1%.

1954—July 20 to September 8—23 tests:—3.2% to 5.0%.

Booth 8: [*Shipping dates:* "A" September 16; "B" September 30; "C" October 14 and 28; "D" November 18.]

1953—August 12 to September 30—53 tests:—2.7% to 5.9%.

" —October 1 to 30— 24 tests:—4.4% to 6.8%.

" —November 7 to 25— 28 tests:—4.7% to 8.4% (26 under 8%)

" —December 3 and 16—3 tests:—8.3%, 9.3%, 8.8%.

1954—August 16 to September 30—31 tests:—3.2% to 6.2%.

" —October 5 to November 10—16 tests:—5.1% to 7.1%.

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*Although not contemporaneous with the oil tests made in State Project 675, the 1957-58 shipping dates (Pl. Ex. 9, R. 330), the latest available in the record on appeal, serve with substantial accuracy for illustrative purposes.

**These oil tests, in most instances, were of composite samples of 10 avocados, selected for uniformity of size. (R. 429)

Lula: [*Shipping dates:* "A" October 7; "B" October 21; "C" November 4 and 18; "D" December 9.]

1953—August 12 to September 30—127 tests:—2.3% to 7.9%.

" —October 1 to 30—91 tests:—4.9% to 11.0%.
(78 under 8%)

" —November 2 to 30—101 tests:—5.4% to 11.3%.
(58 under 8%)

—December 2 to January 13—88 tests:—4.5% to 13.1%.
(32 under 8%)

1954—August 24 to September 28—30 tests:—2.9% to 5.7%.

" —October 4 to 29— 85 tests:—4.7% to 9.2%.
(75 under 8%)

" —November 1 to 30— 44 tests:—5.7% to 9.6%.
(28 under 8%)

" —December 6 to January 11—21 tests:—7.1% to 12.9%
(4 under 8%)

Booth 7: [*Shipping dates:* "A" October 14; "B" October 28; "C" November 11; "D" December 2.]

1953—September 9 to October 14—27 tests:—3.2% to 6.9%.

" —October 16 to 30— 49 tests:—4.2% to 8.3%.
(46 under 8%)

" —November 2 to 23— 60 tests:—4.1% to 11.1%.
(45 under 8%)

" —December 1 to 16— 34 tests:—6.4% to 12.0%.
(10 under 8%)

1954—September 15 to October 12—10 tests:—3.8% to 6.5%.

" —November 2 to 30— 22 tests:—4.1% to 9.8%.
(12 under 8%)

" —December 6 to 14— 6 tests:—5.0% to 10.9%.
(2 under 8%)

Hickson: [*Shipping dates:* "A" October 21; "B" November 4; "C" November 18; "D" December 9.]

1953—September 29 to October 30—10 tests:—5.8% to 7.4%.

" —November 12 to December 4—6 tests:—6.9% to 10.0%.
(3 under 8%)

1954—September 22 to November 10—13 tests:—6.7% to 9.6%.
(9 under 8%)

Collinson: [*Shipping dates:* "A" October 21; "B" November 4; "C" November 18; "D" December 9.]

1954—October 13—1 test:—7.2%.

Booth 3: [*Shipping dates:* "A" November 11; "B" November 25; "C" December 9; "D" December 31.]

1953—October 6 to November 12— 10 tests:—4.0% to 8.3%. (9 under 8%)

" —November 16 to December 31—8 tests:—6.7% to 10.5%. (3 under 8%)

1954—November 10 to December 1—8 tests:—7.4% to 10.0%. (2 under 8%)

Booth 1: [*Shipping dates:* "A" November 18; "B" December 2; "C" December 16; "D" January 6.]

1953—October 22 to December 16—9 tests:—7.5% to 10.9%. (2 under 8%)

1954—November 1 to December 14—11 tests:—8.0% to 11.7%.

Taylor: [*Shipping dates:* "A" November 18; "B" December 2; "C" December 16; "D" January 6.]

1953—October 22 to November 18—21 tests:—6.1% to 9.9%. (12 under 8%)

" —November 24 to January 13—18 tests:—7.4% to 11.4%. (4 under 8%)

1954—November 1 to December 14—16 tests:—7.1% to 10.2%. (6 under 8%)

Oil tests made at Homestead Experiment Station upon request of growers and handlers of avocados.

In addition to the oil tests of avocados made by Dr Harkness as part of his research project, such oil tests continued to be made at the Homestead Experiment Station upon application by growers and handlers of avocados as a public service. (R. 185-186, 215.) In the fall months of 1954, 1955, 1956 and 1957, appellant Florida Lime and Avocado Growers, Inc. procured 150 such oil tests (Pl. Ex. 12, R. 337-340); appellant South Florida Growers Association, Inc., 135 oil tests (Pl. Ex. 13, R. 341-344).

The sole purpose of these oil tests was to ascertain whether the fruit could be shipped to California in face of the 8% oil requirement. (R. 224-225; 284-285.) These oil tests, in general, show the same results as the tests made by Dr. Harkness in course of his research project and in this respect furnish cumulative evidence of the restrictive effect of California's 8% oil standard upon the marketing of the Florida fruit. At the same time, these oil tests show the constant effort of appellants and other handlers of Florida avocados to avail themselves of the California market for their fruit even to the limited extent left open by the 8% oil barrier.

In the 1957-58 season, the latest season embraced in the deposition testimony, appellant Florida Lime and Avocado Growers, Inc. procured 24 oil tests, 20 of Lula avocados and 4 of Booth 8, the two principal commercial varieties of Florida avocados. (R. 340.) The "A" shipping date for Lula avocados in this season, under the regulation issued by the Secretary of Agriculture, was October 7, 1957. (R. 330.) Not until November 12 did any sample of the Lulas show 8% oil content, five weeks after the marketing of the Lulas began. The prior 8 tests of Lulas procured by appellant, from October 8 to November 6, showed oil content of 5.6% to 7.4%. Of the 12 samples tested November 12, 13 and 14, 10 showed oil content of 8.2% to 8.9% and 2 under 8%.* Encouraged by these oil tests, appellant ventured a shipment of a truckload of Lula avocados to California on November 15, 1957, consisting of 1874 quarter-bushel boxes, 900 consigned to Williams and Sons Produce Company, Los An-

*The oil tests made at Homestead were of composite samples of 6 avocados. The official tests made in California, under present regulations, are of individual avocados. (R. 75.)

gelés, and 974 to Felix & Son, Oakland. The [illegible] boxes unloaded at Los Angeles were tested for oil content in three lots, according to size of the fruit (number of avocados per box), and the 361 boxes of 16s and 18s were rejected for insufficient oil content, while the 539 boxes of 14s and 12s passed the oil test. (Pl. Ex. 22, R. 441.) The 974 boxes that went on to Oakland, and were there presumably tested for oil content, apparently passed the test. Fortunately, a buyer for the 361 boxes rejected at Los Angeles was found at Phoenix, Arizona, and the fruit was transshipped to that city, in this instance without loss. (Pl. Ex. 21, R. 440.)

Appellant South Florida Growers Association, Inc. had a similar experience in the 1957-58 season. After processing 22 oil tests of Lula avocados at the Homestead Experiment Station from November 1 to November 12, 1957, with 10 of the samples showing oil content of [illegible] to 7.8% and 12 samples showing 8.1% to 9.1%, appellant on November 14, 1957 sent 1,795 flats to Lucky Stores at San Leandro, California, on order of Calavo Growers of California, appellant's selling agent. At San Leandro, upon test of oil content, 492 flats were barred from sale in California. These 492 flats were transshipped to Salt Lake City, Utah, and sold at $1.00 per flat, as against the price of $1.89 per flat to be paid at San Leandro, and there were added transportation and handling costs of $202.02. (Pl. Ex. 17, 437.)

The report of the oil test made at Los Angeles on November 19, 1957, resulting in the rejection of 361 boxes of Lula avocados, graphically illustrates the practical difficulty and risk involved in appellants' efforts to sell their avocados in California, despite the 8% oil [illegible] (Pl. Ex. 22, R. 441.) As samples for testing, one [illegible]

was chosen from each of five boxes of the 16s and one from each of five boxes of the 18s. The oil percentage of the five 16s was 9.1, 7.8, 7.35, 9.6 and 9.1, and since two of the avocados had less than 8% oil content all of the 16s were tagged as non-conforming. The 18s tested 7.4, 9.95, 7.35, 7.75 and 9.0, three below the 8% oil, and this disposed of all the 18s. Even though picked, packed and shipped on the same day or days, from the same groves and even the same trees, there was inherent and inescapable risk that the individual avocados chosen for oil test would include some with less than 8% oil content.* Such risk is absent when the avocados tested are of varieties that attain 8% oil content at an early stage of growth, long before maturity, such as the dominant California varieties, but the avocados grown in Florida are not of these varieties. (Paragraph XII of complaint, R. 12.)

As appears from plaintiffs' exhibit 21 (R. 439), four entire truckloads of Lula avocados shipped to California by Florida Lime and Avocado Growers, Inc. on November 10, 12, 14 and December 8, 1955, failed to pass the 8% oil test. These shipments were made after the marketing of Lula avocados in the 1955-56 season had been under way since the first week of October 1955. (Pl. Ex. 4, R. 322.) The loss on these four shipments, net after salvage by sale in other far western states, was $7,490.01.

Portions of shipments of Lula avocados to California made by South Florida Growers Association, Inc. on November 10, 12 and 18, 1954, a shipment of Booth 7s on November 11, 1954, a shipment of Lulas on November 10, 1955, and a shipment of Lulas on November 29, 1956, were barred from sale in California upon oil test, then

*(Specimen of Dr. Harkness. (R. 183-185.)

reshipped mainly to Phoenix, Arizona, and there sold at somewhat lower prices, after added transportation and handling costs, as shown by plaintiffs' exhibit 17. (R. 436.) The shipment of November 29, 1956, out of which 721 flats were barred from sale in California, was made nearly two months after commencement of the marketing of Lula avocados in the 1956-57 season. (Pl. Ex. 6, R. 326; Pl. Ex. 7, R. 327.)

Reshipment of rejected avocados from California to cities in neighboring states entails not only loss on resale or reconsignment, it is also disruptive of appellants' direct marketing of the fruit in these cities. (Deposition of Kendall, R. 234.)

Appellants' shipments of avocados to California that were permitted to be sold in that state, listed in defendants' exhibits P, Q, R and S, were made preponderantly well along in November and in December, long after the beginning of the marketing season for the fruit.* As testified by Kendall, there is lively demand for the Florida fruit from representatives of California chain grocery stores as early as September, when the California supply is on the wane, and urgent inquiries for the fruit from California sources all through October, of which the Florida handlers are unable to avail themselves because of the 8% oil barrier. (R. 236-239.) This hurdle precludes arrangement for a fixed schedule of deliveries in California, to synchronize with retail sales promotional programs and

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*The fact that shipments made by Florida Lime and Avocado Growers, Inc. in the latter part of October and the first part of November 1954 apparently passed the California oil test, as indicated by defendants' exhibit S (R. 445), is accounted for by the testimony of Fred Piowaty, sales manager of said appellant, that the oil tests made of these shipments were of composite samples of several avocados, yielding an average result, instead of tests of single avocados as in 1955 and subsequent years. (R. 288.)

advertising, so that what is left to the Florida handlers is haphazard fill-ins, to the limited extent that shipment of the Florida fruit can be risked in face of the 8% oil embargo. (R. 232-233.)

Shipments of Florida avocados

Records of shipments of avocados from the Florida production area are compiled by the Avocado Administrative Committee from the weekly reports of handlers and, as appears from these records, the marketing of each of the varieties of the fruit begins promptly upon the advent of the permissible shipping dates specified in the applicable regulations issued by the Secretary of Agriculture and is completed within a few weeks thereafter. (Pl. Ex. 4 and 7, R. 322, 327.)

In the 1957-58 season, the Avocado Administrative Committee inaugurated issuance of weekly bulletins showing the volume of shipments per week, also whether for Florida or other destinations. These weekly bulletins issued July 1, 1957 to January 13, 1958 were produced by the witness David M. Biggar and in part marked for identification as plaintiffs' exhibit 10. (R. 331.) Total shipments in the 1957-58 season to January 11, 1958 aggregated 300,000 bushels, 8.5% for Florida destinations and 91.5% for other destinations. Of this total, 215,727 bushels were shipped by appellants—6,918 bushels to Florida destinations; 4,981 bushels to California, 203,828 bushels to other states. (Pl. Ex. 19 and 20, R. 438.)

The witness Biggar estimated that the total shipments for the 1957-58 season would be between 450,000 and 500,000 bushels. (R. 130-134.) By mid-November of 1957, 251,307 bushels had been shipped, only a negligible portion to California, and out of the remainder yet to be disposed of in this season only sporadic shipments to California could be hazarded.

Damage to appellants

Continued enforcement of California's 8% oil content requirement obstructs effective marketing of the avocados handled by appellants in two ways: (1) by maintaining an embargo against sale in California of all but a small portion of this fruit, and even as to this portion delaying sale until long after the fruit is ready for marketing; (2) by giving a competitive advantage to the growers and handlers of California avocados not alone in their home state but also throughout the country.

From the records of "unloads" of avocados at the three principal wholesale markets in California, Los Angeles, San Francisco and Oakland (R. 39-42), it is demonstrable that about 50% of all the avocados grown in the United States are consumed in California.* The same records show the extremely limited contribution of Florida avocados to these "unloads":

1954-55: California, 1,873 carlots; Florida, 45 carlots.
1955-56: California, 947 carlots; Florida, 48 carlots.
1956-57: California, 931 carlots; Florida, 64 carlots.

From the tabulations marked for identification as plaintiffs' exhibits 19 and 20, also defendants' exhibits P, Q, R and S (R. 438, 442-447), it is evident that these shipments of Florida avocados to California were preponderantly those of appellants, and from the allegations of paragraphs XIV and XXV of the complaint (R. 9) and reference to plaintiffs' exhibits 17 and 21, showing prices of the avocados barred from sale in California (R. 430,

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*The answer of Director Jacobsen to interrogatory No. 8 indicates that in the 10 crop years from 1944-45 through 1953-54 California produced 79% of the avocados grown in the United States, likewise 79% in the 1954-55 crop year, but 58% in the crop years 1955-56 and 1956-57. (R. 37.)

439), the indicated value of the avocados shipped by appellants to California in the 1954-57 period, net after deduction of estimated cost of transportation from Florida to California, was well over $200,000 in the case of South Florida Growers' Association, Inc. and over $170,000 in the case of Florida Lime and Avocado Growers, Inc. Probable multiplication of appellants' sales of avocados in California, with the arbitrary 8% oil requirement out of the way, is indicated by the fact that the 1954-57 sales were made despite impossibility of surmounting the 8% oil barrier until five to eight weeks or more after the major part of the Florida crop had attained maturity and had to be promptly marketed, also despite the inability of appellants to make commitments at the beginning of the fall season for scheduled deliveries to synchronize with promotional programs for retail sale of the fruit.

Practically all of the shipments of avocados made by appellants to California were of but a single one of the many varieties of the fruit grown in Florida, namely, the Lula variety. In the 1955-56 season an entire truckload of Lulas, shipped as late as December 8, 1955, more than two months after the marketing of this variety began, was barred from sale in California for failure to pass the 8% oil test. (Pl. Ex. 21, R. 440.) In the 1956-57 season, when the marketing of Lulas began October 8, 1956, 721 flats out of a shipment 1550 flats of Lulas made November 29, 1956 were likewise barred from sale in California. (Pl. Ex. 17, R. 439.)

During recent years, the several Booth varieties of Florida avocados, notably the Booth 8, 7, 1 and 3, have gained in favor and account for a large part of the new plantings. The Booth 8, rapidly gaining in volume of production, is an avocado more akin in size and general appearance to the California avocados than the generally

larger Florida varieties, yet because of the 8% oil requirement it has never been feasible to offer the Booth 8 for sale in California. (R. 223.)

Another factor assuring appellants of greatly increased sales of the Florida fruit in California, absent the artificial 8% oil restriction, is taste preference of residents of California who formerly lived in states where the Florida avocados predominate. (R. 237-238.) Also, the low fat content of the Florida avocados, branded as a vice by section 792 of the Agricultural Code of California, may well be regarded as a virtue by many consumers who have as yet had little opportunity to become familiar with the Florida fruit.

The persistent efforts of appellants to avail themselves of the California market for avocados, in face of the 8% oil handicap, is of itself the strongest evidence of the pressing need for free access to this market. Exclusion from the California market, except in small measure and at undue hazard, is but one facet of the economic detriment to appellants of continued enforcement of the challenged California statute. Equally hurtful, if not more hurtful, is the competitive advantage given to California growers in all markets by maintenance of a virtually closed home market. While the major part of the California crop is consumed within the state, the residue is sold in other states at obvious competitive advantage over the Florida growers, over 90% of whose avocados must be sold in these competitive markets. The California growers, with a protected home market for most of their crop, can offer price concessions in the markets where almost all of the Florida product must be sold, thus minimizing the profit potential of the entire Florida crop. The complaint is not of competition, but of artificial handicap against the growers of the Florida fruit.

Summary of Argument.

The Florida avocados handled by appellants enter into the stream of interstate commerce with the imprimatur of the federal government, granted under the commerce clause of the United States Constitution and an implemental Act of Congress. They are freely marketed in all states of the Union except California. By force of section 792 of the Agricultural Code of California, the avocados handled by appellants are permitted to be marketed in that state only if they have 8% or greater oil content. The result of enforcement of this state law is to bar sale in California of most Florida avocados, since they are preponderantly of varieties which because of their innate characteristics either never attain as much as 8% oil content or attain this measure of oil content long after they have come to maturity and are ready to be marketed.

Appellants invoke the commerce clause of the Constitution, the equal protection clause of the Fourteenth Amendment, and the marketing order No. 69 made by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, against application of the California 8% oil requirement to their avocados. They urge that the 8% oil requirement, in application to their avocados, is arbitrary and discriminatory; that it does not serve to protect the people of California from purchasing and consuming immature, deleterious or unhealthful fruit, but only to exclude from that state mature and wholesome avocados grown in Florida, to the competitive advantage of the avocado industry of California; and further, that subjection of appellants' avocados to the California oil content standard, after these avocados have been certified for sale in interstate commerce under fed-

eral law, is an impermissible violation of the supremacy provision of the Constitution.

Further, appellants urge that there is an actual existing controversy between appellants and appellees regarding the constitutional validity of California's 8% oil content standard in application to the avocados of which appellants are handlers; that under Article III, Sec. 2, of the United States Constitution, and under sections 1331 and 1337 of the Judicial Code, the district court has jurisdiction to adjudicate the controversy on the merits, and that under section 1253 of the Judicial Code this court has jurisdiction of the appeal from the judgment of the three-judge district dismissing the action for want of jurisdiction; that appellants' assertion of rights under the Constitution of the United States, and the implemental Act of Congress, is substantial in nature and value; that there are no considerations of equity or public policy to justify non-exercise either by the district court or this court of the jurisdiction conferred by Congress.

ARGUMENT.

I.

Jurisdiction of the appeal.

Because of the nature of the relief sought by appellants, they prayed in their complaint for a hearing by a three-judge district court. (R. 16.) Upon consideration of the complaint, a three-judge court was duly convened and came into session on April 18, 1958 to hear the motions then pending, namely, the request filed by appellants February 24, 1958 that the action be set for trial at the early convenience of the court (R. 29) and the motions filed by appellees March 14, 1958 for dismissal or alternatively for stay of proceedings (R. 44, 78). Eight months after the hearing held April 18, 1958, the court filed its memorandum dismissing the action and stated: "This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U. S. C. A. sections 2281 and 2284." (R. 90.) The court concluded, however, that it lacked jurisdiction to proceed with a determination of the merits of the action because it could not be categorized as a "case" or "controversy" within the scope of the judicial power of the federal courts, as specified in article III of the Constitution of the United States.

From the judgment of the district court, Congress has provided for direct appeal to this court. (28 U. S. C. 1253.) Although the appeal comes to this court as matter of right, pursuant to mandate of Congress, it is of course entirely within the discretion of the court to adjudicate the appeal in whatever manner it may deem appropriate. That the appeal merits plenary consideration, and that the judgment of the district court should be reversed, appellants submit: (1) that, contrary to the holding of the

district court, the complaint presents an existing controversy between the parties, with justiciable issues that can be effectively resolved by decree of the court; (2) that the constitutional rights asserted by appellants and sought to be protected by declaratory judgment and injunction are substantial, legally and factually; (3) that there are no considerations of equity or public policy warranting denial or deferment of a trial of the case on the merits, or refusal to grant the relief prayed if found to be justified by the evidence.

II.

There is an existing controversy between the parties, triable by the district court.

The gist of the district court's opinion is that there can be an existing justiciable controversy between the parties only with respect to the disposition of a particular shipment of appellants' avocados for sale in California, such controversy to be submitted to a state court of California in accordance with the procedure provided by section 385 of the Agricultural Code of California. By this pronouncement the door of the district court is forever closed to appellants, notwithstanding the duty imposed on the court by Congress to adjudicate a controversy of the kind embraced in sections 1331 and 1337 of the Judicial Code.

The district court has declared: "The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues." (Ap. 4.) This enigmatic statement, it is submitted, ignores virtually all of the facts set forth in the foregoing statement of the case. The "past events" in this case include all that appears in the record on appeal as to the business of appellants: that they have been engaged for many years

in large-scale marketing in interstate commerce of avocados grown in Florida; that since June 11, 1954 their marketing of avocados has been conducted in conformity with a federal marketing plan put into force by the Secretary of Agriculture pursuant to authority vested in him by Congress; that all avocados handled by appellants meet the standards of maturity and quality established by the federal government; that for years appellants have made persistent efforts to market their avocados in California, as in all other states of the union, but that these efforts have been thwarted by enforcement against them of California's 8% oil content requirement, alleged to be arbitrary and scientifically indefensible in application to the Florida-grown avocados handled by appellants; that the officials of California have evidenced their consistent purpose to continue to enforce against appellants the 8% oil requirement, the effect of which is to exclude most Florida avocados from the principal market for this fruit in the United States; that continued enforcement of California's 8% oil content law against appellants entails danger of direct loss on attempted shipments of their avocados to that state, as shown by actual experience, also great and irreparable economic detriment by the walling off of the California market against most Florida avocados and the artificial competitive advantage thus given to the growers and handlers of the California-grown avocados.

The complaint in this case presents not an abstract question, but a real, immediate and sharply-defined controversy of substantial commercial importance not alone to appellants but to all growers and consumers of avocados and to the national economy. What is involved in this case is the right of appellants to market their avocados in California free from restriction by a state law alleged

to be unconstitutional, in the several respects set forth in the complaint, not the fate of another shipment of avocados that may be risked by one or other of the appellants in face of the challenged state law. Purposeless sacrifice of a load of Florida avocados of less than 8% oil content is not needed to evidence a real, immediate and substantial interest of appellants in the validity of the California law which restricts marketing of their avocados in that state, no more than it required submission to an arrest to evidence the interest of the appellant in *Ezzers v. Dwyer*, 358 U. S. 202, in the validity of the Tennessee statute which precluded him from riding in Memphis buses if he refused to seat himself in the rear space of such buses assigned to colored passengers.

In many analogous cases not involving any particular present transaction or incident, or present civil action or criminal prosecution by the enforcing state authorities, but based upon a state of facts evidencing the desire and need of the plaintiffs for judicial aid to remove barriers against future exercise of constitutional rights and the intent of state authorities to maintain such barriers, the courts of the United States have intervened to protect the asserted rights by declaratory judgment and injunction. Brief mention is made of a few illustrative cases.

Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320: Injunction granted to restrain enforcement against appellee, a Connecticut manufacturer of comfortables made with sterilized shoddy, of a Pennsylvania statute prohibiting entirely use of shoddy in the manufacture of comfortables; no particular sale or attempted sale of appellee's merchandise involved, only its alleged right to make future sales in Pennsylvania free from prohibition of the challenged statute.

Baldwin v. G.A.F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497:—Plaintiff, a milk dealer in New York, whose milk came from Vermont, was denied a license to continue to sell its milk in New York because it declined to sign an agreement to conform to the New York Milk Control Law, under which dealers were required to pay to producers specified minimum prices for their milk. Although public officials had announced a purpose to prosecute plaintiff for trading without a license, no actual prosecution had been instituted. Nor was there involved any particular sale or attempted sale of imported milk.

Dean Milk Co. v. City of Madison, Wis., 340 U. S. 349, 71 S. Ct. 295:—Pursuant to an ordinance of the city of Madison regulating the sale of milk, plaintiff was denied a license to sell its milk in that city because its pasteurization plants were located more than five miles from the central square of the city. Plaintiff's milk was purchased at many farms in Illinois and Wisconsin and pasteurized in plants located in Illinois towns 65 and 85 miles distant from Madison. In an action for declaratory judgment as to the validity of certain sections of the ordinance, brought in the state circuit court, the validity of the ordinance was upheld; judgment affirmed by the Supreme Court of Wisconsin; reversed by this court. The controversy was as to the right of appellant to deliver and sell its milk in Madison free from "an economic barrier protecting a major local industry against competition from without the state," not a controversy as to the disposition of a particular delivery of appellant's milk to Madison.

Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, and *Johnson v. Haydel*, 278 U. S. 16, 49 S. Ct. 6:—Louisiana Shrimp Act of 1926, also Oyster Act

passed at the same time, held unenforceable against plaintiffs, because by practical operation of the statutes the plaintiffs would be prevented from obtaining shrimp and oysters to be canned in their plants at Biloxi, Mississippi. The controversy was similar in *Toomer v. Witsell*, 334 U. S. 385, 66 S. Ct. 1156, wherein this court held that the five individual plaintiffs, fishermen who resided in Georgia, were entitled to injunctive relief against enforcement of certain provisions of a South Carolina statute the practical effect of which would be to debar them from fishing for shrimp in the three-mile maritime belt off the coast of that state.

H. P. Hood & Sons, Inc., v. Du Mond, 336 U. S. 525, 69 S. Ct. 657:—Plaintiff, engaged in the business of distributing milk and its products to inhabitants of Boston, procured milk from New York and had three receiving depots in that state. Plaintiff desired to establish a fourth receiving plant in New York, but a license to do so was denied by the Commissioner of Agriculture and Markets, acting pursuant to provisions of the Agriculture and Markets Law of New York. The determination made by the commissioner was upheld by the state courts; this court granted certiorari and reversed the judgment of the Court of Appeals of New York. Thus, the matter in controversy in this case was the desire and alleged right of a Massachusetts milk dealer to augment its business by procuring from another state an added supply of the product in which it dealt. Mr. Justice Jackson, delivering the opinion of the court, said:

"Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this court of economic restraints on interstate commerce for local economic advantage, but it does not stand

alone. This court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety. * * * Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his exports, and no state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any. Such was the vision of the founders; such has been the doctrine of this court which has given it reality." (330 U. S. 525, 535, 539.)

Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843:—A single "past event" accounted for this case, that on May 17, 1942 appellant was a passenger on the Southern Railway and made a futile attempt to be seated in the diner, because the two tables conditionally reserved for Negroes were partly occupied by white passengers. In October 1942 he filed a complaint with the Interstate Commerce Commission alleging that the foregoing conduct violated the Interstate Commerce Act by subjecting him to undue and unreasonable prejudice and disadvantage. The commission dismissed the occurrence as a casual incident and declined to enter an order as to future practices by the railroad company. A three-judge district court for the district of Maryland held that the railroad's general practice, as evidenced by its dining car regulations, was in violation of the Interstate Commerce Act and remanded the case to the commission for further proceedings. Thereafter the railroad company announced modified din-

ing car rules which the commission found not to be in violation of the Interstate Commerce Act. Appellant instituted another proceeding in the same district court to have the commission's order set aside, but the court sustained the modified rules. On appeal to this court, the judgment of the district court was reversed. With respect to jurisdiction, this court said:

"It is clear that appellant has standing to bring these proceedings. He is an aggrieved party, free to travel again on the Southern Railway. Having been subjected to practices of the railroad which the commission and the court below found to violate the Interstate Commerce Act, he may challenge the railroad's current regulations on the ground that they permit recurrence of comparable violations. *Mitchell v. United States*, 313 U. S. 80, 92-93." (339 U. S. at p. 823, 70 S. Ct. at p. 846.)

Browder v. Gayle, 352 U. S. 903, 77 S. Ct. 145:—In this action for declaratory judgment and injunction, the district court for Alabama held that the statutes of Alabama and ordinances of Montgomery requiring segregation of white and colored races on motor buses violated the due process and equal protection provisions of the Fourteenth Amendment, and on the appeal this court granted the motion of appellees to affirm the judgment. Each of the four plaintiffs had been required by a bus driver to comply with the segregation laws; two of them who had been arrested and fined for failure to comply had not pursued appeals. A declaration of rights was desired because plaintiffs intended to resume use of the buses if and when they could do so on a non-segregated basis without fear of arrest. (142 F. S. 707.)

Bryan v. Austin, 148 F. S. 563, and 354 U. S. 933, 77 S. Ct. 1396:—A South Carolina statute authorized the

the board of trustees of any school to demand a statement under oath from any teacher as to whether or not he or she was a member of the National Association for the Advancement of the Colored People. Refusal to submit the required statement entailed summary dismissal. An action for declaratory judgment and injunction against enforcement of the statute was brought in the district court for South Carolina by seventeen Negro school teachers who had refused to submit statements and had resigned. The three-judge district court held that it had jurisdiction, but by vote of two of the judges stayed the action to await construction of the statute by the state courts. District Judge Timmerman was of the opinion that the plaintiffs were not in a position to have the statute enforced against them because they were no longer employed as teachers and had no applications for employment pending which could be adversely affected by the statute. Chief Justice Parker, dissenting from the stay order,* urged that a declaration of rights was needed by plaintiffs to enable them to seek employment as teachers; that no administrative remedy could possibly cure the basic defect of unconstitutionality, and that judicial remedies in state courts need not be pursued before resorting to a federal court. By the time the appeal came before this court, the challenged South Carolina statute had been repealed and the cause had become moot, whereupon the judgment of the district court was vacated, "with leave to the appellants to amend their pleadings either to safeguard any rights that may have accrued to them by virtue of the operation of the repealed Act or to set forth a cause of action based on the operation of the new Act."

*148 F. S. at pp. 367-374.

The only "past events" giving rise to this action were the existence of the state law, the request of the school authorities for the prescribed statements and the failure of the teachers to submit statements. The "case" or "controversy" was as to the right of plaintiffs to seek future employment as teachers without compliance with the challenged statute.

Suggested procedure under section 385 of the Agricultural Code of California.

The district court opinion does not stop with the conclusion that appellants' complaint fails to present a justiciable controversy, but goes on to say that such a controversy could arise only if there were co-existence of four facts: (1) bringing of avocados to California by appellants; (2) failure of the avocados to meet the standards fixed by California law; (3) refusal of appellants to recondition or remove the avocados; (4) election by appellants to contest abatement of the avocados in the state courts as provided by section 385 of the Agricultural Code of California. (Ap. 3-4.)

Appellants (1) have brought avocados to California, to the limited extent such shipments could be ventured in face of the 8% oil content requirement; (2) some lots of these avocados have failed to meet the 8% oil test; (3) appellants have not "refused" to recondition the rejected avocados, but have availed themselves of the leave granted by the enforcing officers to remove the avocados from California. There remains to be considered the fourth ingredient of the court's formula, an election by appellants to contest abatement of a particular lot of avocados in the state courts as provided by section 385.

Turning now to section 385 (Ap. 6-9), it is to be noted first that the abatement procedure therein provided for applies to any fruits, nuts, vegetables or containers for which standards are prescribed in chapter 2 of division V of the Agricultural Code. Thus, for one thing, the allowance for "reconditioning" of products or containers found to be nonconforming could have myriad meanings or applications, depending on the fruits, nuts, vegetables or containers in question. The district court suggests that a lot of avocados found to be of less than 8% oil content could be "reconditioned by substitution," but that appellants chose instead to remove nonconforming avocados from the state. (Ap. 2.) It is respectfully submitted that this is an egregious fallacy. Assuming that somehow, after avocados are shipped from Florida to California and there found to contain less than 8% oil, other avocados could be substituted for the 2 to 10 samples tested (R. 75), it would require an oil test (and destruction) of the substituted avocados to make certain that they contain 8% oil. It is apparent that the "substitution" would have to be made by some other method of judging maturity and quality. The next step, presumably, would be a new oil test of the lot of avocados tagged as nonconforming, after substitution of other avocados for those previously tested. (R. 75.) There is no provision in the official regulations for successive oil tests of the same lot of avocados. (R. 74-75.) Were such successive tests permitted, it would reduce the whole process to an absurdity, the turning of a wheel of fortune in an attempt to find a set of sample avocados of 8% oil content and then to remove the tag of noncompliance from the residue of the lot.

Section 385, after stating how the nonconforming products shall be held and tagged, and that notice of such

action by the enforcing officers shall be given to the owner or agent, with opportunity to bring the lot into compliance, prescribes three different procedures for abatement of the nonconforming products. One is destruction of the products with written consent of the persons served with notice. The second is a court proceeding applicable to products that are perishable or subject to rapid deterioration; the third, a court proceeding of a different kind applicable to non-perishable products. Since avocados are highly perishable (R. 235), the second procedure for abatement is applicable, *viz.*:

"(*Petition for abatement.*) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the state to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order." (Ap. 8.)

The manifest purpose and effect of this procedure is to formalize the abatement and protect the enforcing officer by making a court record of the officer's finding of noncompliance, the giving of the requisite notice of noncompliance and failure of the owner or agent to correct the deficieny. The discretion given to the court is to determine whether the nonconforming lot shall be forthwith destroyed or the nuisance otherwise abated. A lot of avocados of less than 8% oil content, if subjected to such abatement procedure, would necessarily be forthwith destroyed, or perhaps permitted to be removed from

the state as has been done by the enforcing officers without court sanction. This appears to be the alpha and omega of an abatement proceeding under section 385 relating to avocados.

Injunction, and even more declaratory judgment, are legal remedies fashioned to prevent risk or sufferance of loss, penalties, deprivation of anticipated trade and profits, or thwarting of personal or property rights, for which there is no adequate protection by suit for a money judgment. The sacrifice of a load of fruit suggested by the district court would be as purposeless as submission to an arrest by the appellant in *Ezers v. Dwyer*, *supra*, or submission to discharge in lieu of resignation by the teachers who sued for declaratory judgment in *Bryan v. Austin*, *supra*, and would not in the least help to define the issue in dispute between the parties to this action. The issue is not as to the correctness of the method used in California to make oil tests of avocados, or as to the correctness of such test in a particular instance. The issue is as to the propriety of subjecting any of appellants' avocados to the California oil test, just as the issue in *Public Utilities Commission of California v. United States*, 355 U. S. 534, 536-540, 78 S. Ct. 446, 449-451, was the propriety of subjecting the United States to the administrative procedure called for by section 530 of the Public Utilities Code of California, an issue decided in that case without requirement of any prior administrative proceeding of the kind called for by the state law.

Authorities cited by district court

The authorities cited by the district court do not gainsay jurisdiction in the present case. The unique proceeding in *Muskrat v. United States*, 219 U. S. 346, 31 S. Ct. 250, had its genesis in an act of Congress passed March

1, 1907, attempting to confer jurisdiction upon the Court of Claims, with right of appeal to the Supreme Court, in a proceeding to be instituted for the purpose of obtaining an adjudication as to the constitutionality of certain acts of Congress relating to allotments of the lands and funds of the Cherokee tribe and to the restrictions upon alienation, encumbrance or right to lease the allotted lands. The proceeding was not a form of action that could result in a judgment enforceable against the litigants, but was intended merely to obtain an advisory opinion of the court regarding the validity of the acts of Congress in question, an indirect method of obtaining an advisory opinion which this court would decline to give at the direct request of Congress. By contrast, the present proceeding is a conventional action for injunctive relief, combined with an action for declaratory judgment pursuant to section 2201 of the Judicial Code, with adversary parties against whom the judgment of the court will be enforceable and effective.

Ramspeck v. Federal Trial Examiners Conference, 345 U. S. 128, 73 S. Ct. 570, cited by the district court, was decided on the merits and involved no question of the jurisdiction of the federal courts.

In *United Public Workers, et al., v. Mitchell*, 330 U. S. 75, 67 S. Ct. 556, twelve federal civil service employees, also United Public Workers of America, sought to enjoin enforcement of the Hatch Political Activity Act and this court held that there was a justiciable controversy only upon the complaint of the appellant Poole; that as to the other appellants there was no sufficiently precise showing of the political activity in which they desired to engage, so that it could not be determined whether or not the proposed political activity was prohibited by the Act

and might subject them to its penalties. "We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication." (67 S. Ct. at p. 564.) As to the appellant Poole, however, he was under charge by the Civil Service Commission with political activity forbidden by the Act, and a proposed order for dismissal from his position specified the place and exact nature of such activity (67 S. Ct. at p. 565, footnote 24). Certainly the holding in the cited case is not authority for non-exercise of jurisdiction in the present case, since the record on this appeal shows abundantly what the appellants desire to do, that is, to market in California, as in all other states, avocados grown in Florida of less than 8% oil content, but nevertheless mature and of good quality, inspected and certified as in conformity with the standards established under federal law.

The decision of this court in *Public Service Commission of Utah v. Wycoff Co.*, 344 U. S. 237, 73 S. Ct. 236, does not militate against exercise of federal jurisdiction in the present case. Although the complaint prayed for declaratory relief and injunction to prevent the Public Service Commission from attempting to stop plaintiff from transporting motion picture film and newsreel between points within the state of Utah, on the ground that this would interfere with interstate commerce, plaintiff "offered no evidence whatever of any past, pending or threatened action by the Utah Commission touching its business in any respect." Notwithstanding the prayer for injunction, no request was made for hearing by a three-judge district court. The district court, after trial, found that plaintiff's transportation between points in Utah was nothing more than intrastate commerce and

upon that ground dismissed the complaint; the Court of Appeals found the contrary, reversed the judgment and remanded the case for further proceedings; this court granted certiorari and held that the suit could not be entertained as one for injunction and should not be continued as one for declaratory relief. Mr. Justice Jackson, speaking for the majority of the court, said:

"The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the commission is without power to enter any specific order or to take any concrete regulatory step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, so what? To that ultimate question no answer is sought. A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and counsel little more articulate." An anticipatory declaration as to the validity of possible action to be taken by the commission, of a kind left to conjecture, was said to be "much like asking a declaration that the state has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment." (344 U. S. at pp. 244 and 245.)

California maintains in force the provision of its Agricultural Code barring sale in that state of avocados of less than 8% oil content. Florida avocados of less than 8% oil content, shipped to California in interstate commerce, have in the past been barred from sale in that state and there is no vestige of doubt will continue to be barred by the enforcing officers of the state unless

and until the 8% oil law is declared invalid by a court of competent jurisdiction. In contrast with the *Wycoff* case, there is certainty and not conjecture regarding the course of state action alleged unjustifiedly to interfere with interstate commerce, certainty of the adjudication sought by appellants, and certainty that the proposed decree will end the controversy.

In *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461, an action for declaratory judgment wherein the district court dismissed the complaint upon the ground that it did not set forth a "controversy," and the judgment was affirmed by the Court of Appeals, this court reversed the judgment and declared that a justiciable dispute existed between the insurer and the insured with respect to legal rights and obligations arising from the contracts of insurance issued to the insured. The insured claimed the benefits provided by the policies for total and permanent disability, without obligation to pay further premiums, while the insurer claimed that the alleged disability did not exist and that the policies had lapsed for nonpayment of premiums. Determination of the disputed question of fact, whether the insured was totally and permanently disabled when he ceased to pay premiums, would settle the dispute as to the rights of the parties under the policies, and this question of fact could be litigated in the insurer's action for declaratory judgment as well as in an action by the insured for unpaid benefits.

The decision in *Aetna Life Insurance Co. v. Haworth*, it is submitted, is authority for the exercise of jurisdiction in the present case. Appellants, licensed under federal law as dealers in avocados grown in Florida, are engaged in marketing such avocados throughout the United

States. The avocados indigenous to Florida are of low oil content; most of them never attain as much as 8% oil content; those that ultimately attain 8% oil content do so only late in the marketing season. A California law bars sale in that state of all avocados of less than 8% oil content, so that its practical effect is to preclude the marketing of most Florida avocados in that state, although these avocados attain maturity and are of good quality even though of less than 8% oil content. California's 8% oil requirement has been enforced against appellants at all times that they have ventured to make shipment of their avocados to that state and avowedly will continue to be enforced while the law remains in force. The question whether the 8% oil barrier can justifiably continue to be maintained against importation and sale in California of appellants' avocados, in face of the commerce clause of the United States Constitution, the equal protection clause of the Fourteenth Amendment, and the express permission given under an act of Congress to market these avocados in interstate commerce, is as clearly a "case" or "controversy" as the dispute held to be justiciable in the *Aetna* case.

III.

Appellants' assertion of constitutional rights is substantial in nature and value.

A.

The commerce clause of the United States Constitution, article I, section 8, clause 3, of its own force and without aid of legislation by Congress regulating interstate commerce, renders void a state law that in its practical operation obstructs and burdens interstate commerce by imposing unreasonable and arbitrary conditions affect-

ing importation and sale of the wholesome and legitimate products of another state.

Minnesota v. Barber, 136 U. S. 313, 10 S. Ct. 862.

Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213.

Shollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757.

Collins v. New Hampshire, 171 U. S. 30, 18 S. Ct. 768.

West v. Kansas Natural Gas Co., 221 U. S. 229, 31 S. Ct. 565.

Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334.

Southern Pacific Co. v. State of Arizona, 325 U. S. 761, 767-768, 779-781, 65 S. Ct. 1515, 1519-1520, 1525-1526.

Freeman v. Hewit, 329 U. S. 249, 252, 67 S. Ct. 274, 276.

In the case last cited, dealing with the Indiana Gross Income Tax Act of 1933, the court stated (by Mr. Justice Frankfurter):

"In two recent cases we applied the principle that the commerce clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states. In short, the commerce clause even without implementing legislation by Congress is a limitation upon the power of the states. *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Morgan v. Virginia*, 328 U. S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the nation's history. This limitation of state power, as the *Morgan* case

so well illustrates, does not merely forbid a state to single out interstate commerce for hostile action. A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to similar encumbrance. * * * These principles of limitation on state power apply to all state policy no matter what interest gives rise to its legislation."

Reference is also made under this division of the argument to *Baldwin v. G. A. F. Seelig, Inc., H. P. Hood & Sons, Inc., v. Du Mond, Dean Milk Co. v. City of Madison, Wis., Foster-Fountain Packing Co. v. Haydel, Johnson v. Haydel,* and *Toomer v. Witsell,* cited *supra,* at pp. 29-31.

That the rights asserted by appellants under the commerce clause of the United States Constitution are akin to those asserted and protected in the foregoing decisions of this court appears clearly from the averments of the complaint.

Since California's 8% oil content law, in practical effect, results in discriminatory advantage to the growers and handlers of the avocados of high oil content indigenous to California, against those who bring into the state the avocados of low oil content indigenous to Florida, enforcement of the 8% oil requirement against appellants also denies to them the equal protection of the laws guaranteed by the Fourteenth Amendment. Assuming that the purpose prompting enactment of the 8% oil law was to protect the people of California from purchase and consumption of unhealthful or immature fruit, appellants submit that application of the 8% oil requirement to the Florida avocados of which they are handlers does not at all serve such purpose, but serves instead merely to give

their California competitors an artificial competitive advantage. (*Morey v. Doud*, 354 U. S. 467, 463-468, 77 S. Ct. 1344, 1349-1351, and the cases therein discussed.) There is "invidious discrimination" in a classification of avocados favoring all those with 8% oil content against all with less than 8% oil, in disregard of the inherent differences between the numerous varieties of the fruit arising from the climatic conditions under which they are grown and the arbitrariness of oil content as a criterion of quality and maturity of the varieties grown in Florida.*

B.

Enforcement of California's 8% oil content law to bar sale in that state of Florida avocados of less than 8% oil content, but certified as mature and of requisite grade under standards established pursuant to an act of Congress regulating interstate commerce, defeats the effectiveness of the federal regulation and is impermissible.

Currin v. Wallace, 306 U. S. 1, 11, 59 S. Ct. 379, 385:- Action by tobacco warehousemen and auctioneers in Oxford, North Carolina, for declaratory judgment as to constitutionality of Tobacco Inspection Act passed by Congress in 1935 and for injunction against its enforcement; held that the plaintiffs were entitled to invoke the Declaratory Judgment Act, that Congress had authority to enact the challenged statute and to delegate to the Secretary of Agriculture authority to establish standards for the tobacco to be sold at designated auction markets. What is said in the opinion of the court (by Mr. Justice Hughes)

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*In numerous other standardization provisions in the California Code, inherent differences in the several varieties of the fruits and differences in growing conditions in different parts of the state, are given recognition.

in the cited case is directly applicable to the contention of appellants in the present case, *viz.*;

"Having this authority to regulate the sales on the tobacco market, Congress could prescribe the conditions under which the sales should be made in order to give protection to sellers or purchasers or both. Congress is not to be denied the exercise of its constitutional authority in prescribing regulations merely because these may have the quality of police regulations. * * * Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the states to enact inspection laws is recognized by the Constitution. * * * But the inspection laws of a state relating to exports or to articles purchased for shipment to other states are subject to the paramount regulatory power of Congress. *Turner v. Maryland*, 107 U. S. 38, at pp. 57, 58, 2 S. Ct. 44, at p. 60. And Congress has long exercised this authority in enacting laws for inspection and the establishment of standards in relation to various commodities involved in transactions in interstate or foreign commerce. (Statutes cited in footnote 10.)" (307 U. S. at pp. 11-12, 59 S. Ct. at p. 385.)

Instances of application of the principles enunciated in *Currin v. Wallace* include the following:

McDermott v. Wisconsin, 228 U. S. 115, 133, 33 S. Ct. 431, 435:- Wisconsin law relating to the labeling of glucose mixtures offered for retail sale held inapplicable to such product when labeled in conformity with the requirement of the federal Pure Food and Drug Act.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 167-168, 62 S. Ct. 491, 502-503:- Condemnation of renovated butter under the laws of Alabama held to conflict with the

provisions of the federal Internal Revenue Code regulating the inspection, manufacture, storage and marking of renovated butter, therefore the judgment below denying injunctive relief was reversed.

Rice v. Santa Fe Elevator Corporation, 331 U. S. 218, 67 S. Ct. 1146:- Plaintiffs were engaged in the business of operating public warehouses for the storage of grain in Illinois, under licenses issued by the Secretary of Agriculture pursuant to the United States Warehouse Act, and it was held by this court that the plaintiffs were not subject to regulation under the Illinois Public Utilities Act and the Illinois Grain Warehouse Act with respect to matters under federal regulation. "The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the federal act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the state. By that test each of the nine matters we have listed is beyond the reach of the Illinois Commission since on each one Congress has declared its policy in the Warehouse Act. The provisions of Illinois law on those subjects must therefore give way by virtue of the supremacy clause. U. S. Const., Art. VI, Cl. 2." (331 U. S. at p. 230, 67 S. Ct. at p. 1155.)

Franklin National Bank of Franklin Square v. New York, 347 U. S. 373, 375-379, 74 S. Ct. 550, 552-554:- The New York Banking Law prohibited use of the word "savings" in the name of any bank other than its own chartered banks and savings and loan associations, and this state law was held to be invalid in application to national banks regulated under the Federal Reserve Act. "There appears to be a clear conflict between the law of New York and the law of the federal government. We

cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the federal government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy." (347 U. S. at pp. 378-379, 74 S. Ct. at p. 554.)

State laws and proceedings dealing with labor-management relations have been held invalid by this court, in an array of cases, because of conflict with national legislation regulating such relations. A summary of earlier cases appears in the opinion of the court (by Mr. Justice Frankfurter) in *San Diego Building Trades Council, etc. v. Garmon*, 79 S. Ct. 773.

The federal marketing agreement under which appellants market their avocados has as its main feature the establishment by the Secretary of Agriculture of maturity and quality standards for the avocados coming from the production area to which the agreement applies. When shipped for sale in California, compliance of these avocados with the standards of maturity and quality established under federal law is ignored and compliance with a basically different standard is demanded. Appellants submit that their assertion of rights under the Constitution of the United States and under the Agricultural Marketing Agreement Act of 1937, is indeed substantial.

C.

As to the substantiality of appellants' assertion of rights in monetary value, little need be added to the statement of the facts at pp. 6-8 and 20-22, *supra*. Despite the 8% oil barrier, limiting appellants' sales of avocados in California virtually to a single variety, and to sales

even of this variety late in the marketing season, each of the appellants has sold a substantial volume of avocados in California since 1954. There could be no stronger evidence of the demand for Florida avocados in California. Stated in dollars, the gross receipts of appellant South Florida Growers Association, Inc. from sale of avocados in the three fiscal years from April 1, 1954 to March 31, 1957 aggregated $2,819,718, of which $223,514 was derived from sales in California. (R. 85-86.) The gross receipts of appellant Florida Lime and Avocado Growers, Inc. from sale of avocados during the same three-year period aggregated $761,934, of which $177,502 was derived from sales in California. (R. 87-88.)* It is apparent that even a modest increase of sales, in an unrestricted California market, would soon mount up to a large figure. Growth of the avocado industry in Florida indicates ability to meet increased demand for the fruit in all markets.

In the California market particularly, the Booth 8 variety of Florida avocados—akin in size and general appearance to the leading California varieties—would be especially competitive, but the 8% oil barrier has kept the Booth 8 completely out of the California market. (R. 217, 224.) The Booth 8 is rapidly increasing in volume because the newer groves have been planted heavily with this variety. (R. 224.)

In many cases in the federal courts in which the object of the suit was to remove an obstruction to the carrying on or expansion of business, and in which both jurisdiction and the right to injunctive relief depended upon proof of the value involved, such proof was made by show-

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*More than half of the California sales of Florida Lime and Avocado Growers, Inc., in the three-year period were made in 1954. (See footnote on p. 18, *supra*.)

ing reasonable anticipation of increased sales and profits upon removal of the obstruction. (*Gibbs v. Buck*, 307 U. S. 66, 76, 59 S. Ct. 725, 730, footnote 10; *Nord v. Griffin*, 7 C. A., 86 F. 2d 481, 483, c.d. 300 U. S. 673; also cases cited in the annotation "Jurisdictional amount in injunction suits," 30 A. L. R. 2d, Secs. 27, 28 and 29.) In the unfair competition case of *Food Fair Stores v. Food Fair*, 1 C. A., 177 F. 2d 177, 183, the plaintiff was a Pennsylvania corporation then operating 103 stores in 7 states, but none in Massachusetts. It brought suit in the federal court to enjoin operation of stores by defendant in Massachusetts under the name "Food Fair" and, as proof both of the requisite jurisdictional amount and the right to injunctive relief, showed past negotiations for acquisition of stores in Massachusetts without result, and "active contemplation" of future acquisition of stores in that state. The value involved was said to be the custom to be derived from such contemplated stores, if opened free of competition with other local stores by the same name.

In *Morey v. Doud*, 146 F. S. 887, affd. 354 U. S. 457, 77 S. Ct. 1344, this court accepted as sufficient showing of imminence of irreparable injury the representation of plaintiffs that they were deterred from establishing additional currency exchanges and thus expanding their business by fear of incurring the penalties of the challenged Illinois statute, also their contention that the statute gave a competitve advantage to American Express Company.

In the present case, appellants claim that expansion of their sales in California is checked by the challenged California statute and that their profits are curtailed by the competitive advantage thus given to the producers of Cali-

fornia avocados not alone in their own state but throughout the country. There is no possible recovery of damages for the economic detriment of which appellants complain, the hazard of further loss on shipments of their avocados to California in face of the 8% oil content requirement, the loss of opportunity to expand their sales in the principal market for avocados in the United States, and the discriminatory competitive advantage to the California avocado industry resulting from continued enforcement of the 8% oil law. As stated in the answer to appellees' motion to dismiss the appeal, the detriment to appellants of enforcement of the challenged California law is real, substantial, immediate and continuous, and increases in extent as the avocado trees planted in Florida in recent years come into fruition.

IV.

There are no considerations of equity or public policy to warrant non-exercise of federal jurisdiction in this case.

The disposition of this case made by the district court invites repetition of the oft-quoted admonition of Mr. Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257, 290: "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

Certainly the duty of the federal courts to exercise jurisdiction of controversies arising under the Constitution and laws of the United States, even more emphati-

cally a controversy arising under an Act of Congress regulating interstate commerce, is no less mandatory than the duty to exercise jurisdiction in diversity cases. (*Meredith v. City of Winter Haven*, 320 U. S. 228, 234-238, 64 S. Ct. 7, 11-13.) Granted that there is here a "controversy" within the judicial power of the United States, there are present no extraordinary circumstances to excuse refusal or deferment of exercise of federal jurisdiction in this case.

The state law in question calls for no construction. Its meaning is entirely clear. Even if there were leeway for construction of the statute, affecting the issue here to be determined, that would not be a valid reason for non-exercise of federal jurisdiction in this case. (*Meredith v. City of Winter Haven, supra; Doud v. Hodge*, 350 U. S. 485, 76 S. Ct. 491.)

The only state court proceeding suggested by the district court for assertion of the rights claimed by appellants, interposition of a defense by appellants to a petition by an enforcing officer under section 385 of the Agricultural Code for abatement of a lot of avocados found to be of less than 8% oil content, would be bootless and would not reach the issue of the constitutionality of the statute pursuant to which the oil test is made (*supra*, pp. 34-37). Even if there were possibility that the issue of constitutionality could be litigated in such abatement proceeding, such issue is *judicial* in nature and appellants would still have the right to choose the federal court as the forum in which to litigate the issue. (*Lane v. Wilson*, 307 U. S. 268, 274, 59 S. Ct. 872, 875; *Railroad & Warehouse Commission of Minnesota v. Duluth Street Ry. Co.*, 273 U. S. 625, 628, 47 S. Ct. 489; *Bacon v. Rutland R. Co.*, 232 U. S. 134, 34 S. Ct. 283.)

Conclusion.

This court has made immeasurable contribution to fulfillment of the purpose of the federal constitution to provide freedom of commerce among the states. This case, it is submitted, presents another occasion for such service to the nation. No matter what motives inspired the original enactment of the California law in question, it is now established by horticultural research and experimentation that percentage of oil content is not a scientifically defensible determinant of maturity of avocados, and that the vice of the attempt to judge maturity by oil content is greatly aggravated when the same percentage of oil content is required of all the numerous varieties of the fruit in disregard of innate differences in characteristics.

Since June 11, 1954 appellants have been permitted to market the Florida-grown avocados only when certified as in compliance with the maturity and quality standards imposed by federal law, yet such certification of appellants' avocados has been held for naught by the state officers of California. Only by intervention of this court can this flagrant flaunting of federal law be stayed. The judgment of the district court, denying hearing of appellants' complaint, appellants urge, should be reversed.

Respectfully submitted,

ISAAC E. FERGUSON,

Attorney for Appellants.

APPENDIX I

Opinion of District Court

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, Defendants. Civil No. 7648.

MEMORANDUM AND ORDER

This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U. S. C. A. §§2281 and 2284.

Plaintiffs are Florida growers and packers of avocados and, concededly, are engaged in the interstate marketing of their product. They complain of the barrier which certain portions of the California Agricultural Code assertedly presents to the importation of their product into the State of California.

Division 5 ("Standardization"), Chapter 2 ("Fruit, Nut and Vegetable Standards"), of the California Agricultural Code, sets out a comprehensive system of packing, marketing and quality control of agricultural products including, *inter alia*, avocados. Plaintiffs first encounter this control as their fruit enters California, inspection being had at the familiar agricultural inspection stations located at the border wherever a highway enters the State (§782.6).[1] There the load is sampled (§782), and if

[1]All references in this opinion to sections are to sections of the Agricultural Code of the State of California unless otherwise specifically noted.

the fruit fails to meet the standards imposed by any pertinent section of the Agricultural Code (§785), the load is tagged as nonconforming fruit. Such noncomplying fruit is declared a nuisance and, if not reconditioned, is subject to seizure and eventual abatement as a nuisance (§78

Reconditioning would involve, here, the substitution of qualified fruit for that found lacking, when weighed against the standards fixed by Chapter 2. The specific standard of which plaintiffs complain is that found in §792, which requires that all avocados contain not less than 8% oil by weight, excluding the skin and seed.

Plaintiffs allege that the variety of avocado grown by them in Florida differs from those grown in California in that they inherently possess a lesser percentage of oil by weight than those cultivated in California; that the varieties which they would introduce into California seldom meet the oil test of §792 at the time when they are in prime marketing condition.

It is further alleged that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standard imposed by §792, and that those nonconforming loads were not reconditioned by substitution, but were removed from the state and marketed elsewhere (§785).

On the above stated facts, plaintiffs ask this court for certain declaratory and injunctive relief. Such relief cannot be granted as this court lacks jurisdiction of the cause.

The basic rule is that this court is a court of limited jurisdiction, and has no authority beyond that specifically granted it by law. The jurisdiction of this court is never presumed. The presumption is to the contrary (Lehigh Mining & Manufacturing Co. v. Kelly, 160 U. S. 327; United States v. Green, 107 F. 2d 19; and Durkey v.

Arndt, 46 F. Supp. 256). The first principle of federal jurisdiction is that it is the duty of litigants to make clear to the court the basis of its jurisdiction over the proceeding. Likewise, it is the duty of the court to make sure that jurisdiction exists. If federal jurisdiction is not apparent, the court not only will, but must, refuse to proceed with the determination of the merits of the controversy, unless this failure can be cured. This is true regardless of what stage the case may be in, and whether the defect is called to the court's attention by suggestion of the parties, or otherwise (Mansfield, C. & L. M. Railway Co. v. Swan, 111 U. S. 379; Warner v. Territory of Hawaii, 206 F. 2d 851; Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623; Skelly v. Dockweiler, 75 F. Supp. 11; and American Distilling Co. v. City of Sausalito, 73 F. Supp. 520).

The jurisdiction of a federal district court finds its initial limitation in the ultimate source of the court's authority, namely, the Constitution of the United States. A matter, to be justiciable, must be capable of categorization as either a "case" or a "controversy" (United States Constitution, Art. 3). While a wide variety of forms of action and remedies are permissible, the complaint—as a constitutional prerequisite to the assumption of jurisdiction by a federal court—must show that the case presents for determination *an existing dispute as to present legal rights.* When this is not affirmatively shown, the case must be disposed of as provided by the Federal Rules of Civil Procedure, §12(h)(2), where it is decreed that, ". . . Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual con-

troversy could arise only if there were a co-existence of four facts, namely:

1. The bringing of avocados to California by plaintiffs;

2. The failure of avocados to meet the standards fixed by law;

3. The refusal of the plaintiffs to recondition or remove the avocados; and

4. An election by plaintiffs to contest the abatement in the State courts as provided by §785.

This lack of a present, actual, existing controversy concludes the jurisdiction of this court (Muskrat v. United States, 219 U. S. 346). The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues (Aetna Life Insurance Co. v. Haworth, 300 U. S. 227). The record now before this court shows no more than a mere prospect of interference posed by the bare existence of the law in question (United Public Workers v. Mitchell, 330 U. S. 75; and Wycoff Co., Inc. v. Public Service Comm'n. of Utah, 344 U. S. 237; c.f.: Ramspeck v. Federal Trial Examiners, 345 U. S. 128). On the record now before it this court has no authority to take jurisdiction in this case, and is left with no course other than to dismiss the action at this time.

Defendants have filed motions to dismiss this action on a variety of grounds, all of them being premised on various subsections of Federal Rules of Civil Procedure §12. Since this case must be dismissed because of a lack

of jurisdiction, it is unnecessary to consider defendants' motions to dismiss.

IT IS, THEREFORE, ORDERED that plaintiffs' complaint and the cause of action sought to be set forth in said complaint be, and the same is, hereby dismissed.

Dated: December 17th, 1958.

ALBERT LEE STEPHENS
Chief Judge, United States Court of Appeals for the Ninth Circuit.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge.

APPENDIX II

Agricultural Code of California, Division V, Standardization*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place deliver for shipment, deliver for sale, load, ship, transport cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

(Warning tag: Detachment, alteration, etc., unlawful.) The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

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*Deering's Agricultural Code of the State of California, 1950 with supplement covering legislation through 1957 session.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owner.) If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such

consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 680, §2, ch. 752, §1; Stats. 1955, ch. 431, §1.)

Section 7859. *Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc.; defined: Disposition of money recovered.* Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value or lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and

fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both.

APPENDIX III

Agricultural Marketing Agreement Act of 1937*

7 U.S.C.A. Sec. 601. Declaration of conditions.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246.

7 U.S.C.A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current

---

*The Agricultural Marketing Agreement of June 3, 1937 (7 U.S.C.A. sections 671-674) affirmed the validity of specified sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U.S.C.A. page 337.)

consumptive demand in domestic and foreign markets and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§1, 2, 49 Stat. 750, 782; June 3, 1937, c. 296, §§1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 605-608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title, as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906.

7 U.S.C.A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

* * * * * * * * *

7 U.S.C.A. Sec. 608b. Marketing agreements; exemption from anti-trust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture

shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said section. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 160, Title II, §206(d), 61 Stat. 208.

7 U.S.C.A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin). * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions

thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers.

* * * * * * * *

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

* * * * * * * * *

Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.

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JAMES R. BROWNING, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 49

[illegible] and SOUTH FLORIDA FLOWERS ASSOCIATION, INC., Florida corporation,

Appellants,

vs.

[illegible] Director of the Department of Agriculture of the State of California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLEE'S BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 49

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLEE'S BRIEF

OPINION BELOW

The opinion of the three-judge district court dismissing the case for lack of jurisdiction is reported at 169 F. Supp. 774.

JURISDICTION

Appellee has heretofore moved that the appeal be dismissed because it is not within the jurisdiction of this Court, and alternatively, that the judgment below should be affirmed because the questions presented are so unsubstantial as not to need further argument. By order of June 22, 1959, the Court postponed consideration of jurisdiction to the hearing of the case on the merits. 359 U. S. 915.

QUESTIONS PRESENTED

Whether this Court has jurisdiction of the case under 28 U. S. C. Sec. 1253.

Whether there exists a case or controversy under Article III, United States Constitution, cognizable in the United States District Court.

STATUTES INVOLVED

The pertinent provisions of the California statutes (Calif. Agr. Code, Secs. 784, 785, 785.6, 792, 831) and of the California regulations (3 Calif. Adm. C., Secs. 1366.2 and 1397.6) are set forth in Appendix A to Appellee's Brief.

STATEMENT

Appellants' complaint in the district court asks that the California avocado maturity statute be declared invalid under the Federal Constitution and under controlling federal law, and that California officers be restrained from enforcing the state statute. Appellants are Florida corporations engaged in the business

marketing avocados and other agricultural products grown in Florida (R. 4, 219, 281). California Agricultural Code Section 792, the statute under attack by appellants, is part of a comprehensive statutory scheme regulating the quality and maturity of agricultural products sold to California consumers. See California Agricultural Code Sections 751-1149.9. Section 792 provides in relevant part:

> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed."

The 8 percent oil content requirement of Section 792 was first adopted by the California Legislature as a measure of avocado maturity in 1925. Section 10, Chapter 350, California Statutes of 1925. The 8 percent oil test for determining avocado maturity has been a part of the California Agricultural Code ever since.

Both appellants began marketing avocados grown in Florida in 1939 (R. 219, 281). They began shipping Florida avocados to California markets in 1954 (R. 226, 289). The complaint initiating the present litigation was filed in the United States District Court for the Northern District of California on November 13, 1957 (R. 4). In their complaint appellants contend that as applied to Florida avocados marketed in California, the 8 percent oil maturity law is unconstitutional under the Commerce Clause and the Equal Protection Clause of the Constitution (R. 5). Appellants' complaint also contains that this oil standard is invalid as being in

conflict with the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246; 7 U. S. C. Secs. 601-659, and as implemented by an administrative marketing order issued by the Secretary of Agriculture regulating avocados grown in South Florida (R. 6; 7 CFR Part 1, 969). Appellants prayed for both interlocutory and permanent injunction over against appellees, but neither appellant has taken any steps toward applying for interlocutory relief (R. 1-16).

After appellees answered the complaint, appellants by written stipulation were given permission to take depositions of their own witnesses in Florida. [Original Certified Record, 190].[1] The stipulation signed by counsel for appellants stated "that plaintiffs [appellants] represent that said depositions are not being taken for purposes of discovery but are to be offered in evidence by the plaintiffs [appellants] and are being taken for plaintiffs' sole benefit and are not sought by the defendants [appellees] hereto" [Original Record, 190]. Two of the depositions contained in the printed record on appeal are those of Harold E. Kendall, President of appellant South Florida Growers Association, Inc., and Fred A. Piowaty, Assistant General Manager of appellant Florida Lime and Avocado Growers, Inc. (R. 218-280; 281-298).

[1] Counsel for appellants and appellee have filed a stipulation dated July 13, 1959, agreeing that reference may be had to the oral argument to the unprinted portions of the record on file with the clerk.

The allegations of appellants' complaint and the evidence presented by their principal officers, Kendall and Piowaty, reflect the following pattern of business: Between them appellants market approximately 50 percent of all avocados grown in Florida (R. 9). Avocados are but one of a number of Florida agricultural products marketed by appellants (R. 219, 281).

Since 1954, when appellants first began marketing avocados in California, approximately 96.35 percent of all avocados shipped by appellants to California passed the 8 percent oil test of maturity and were freely marketed in California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286; D. Ex. S, R. 445, 296).[2] Appellant Florida Lime and Avocado Growers, Inc., claims that during the marketing seasons for the years 1954 to 1957, 6,681 lug boxes of its avocados—representing only 5.47 percent of the total shipped to California during the period—failed to comply with the avocado maturity law (Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). Appellant South Florida Growers Association, Inc., asserts that during the 1954 to 1957 marketing seasons 941 bushels, representing only 1.84 percent of the avocados it shipped to California during that period, were determined by California authorities to be in noncompliance with the 8 percent oil law (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248).

Appellant Florida Lime and Avocado Growers, Inc., during the years 1954, 1955, 1956 and 1957, made total

[2] All exhibits marked for identification only, e.g., R. 116.

national shipments of 123,833 bushels of avocados, of which the shipments to California amounted to 16,7[illegible] bushels or 13.53 percent of the national total (Pl. Ex. 20, R. 438, 283). The quantity which this appellant claims failed to comply with the California oil maturity standard during these years amounted to 1,8[illegible] bushels, representing .74 percent of this appellant's total avocado sales (Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). Shipments to California during this period represented only 5 percent of appellant Southern Florida Growers Association's total national sales, and the 642 bushels which failed to meet the California maturity standard represented .09 percent of this appellant's total national avocado sales for these years (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248).

The pattern of business operations followed by both appellants, upon receiving notice from California authorities that a shipment of avocados did not comply with the avocado maturity law, has been as follows. Both followed the practice of voluntarily transshipping these lots for sale in other western markets outside California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, 439, 286; 234). The financial loss which appellants claim resulted from the operation of the California statute was a reduction in anticipated returns from sales of noncomplying fruit on other western markets (R. 249-251, 292-293). Appellant Florida Lime and Avocado Growers, Inc., for example, claims a reduction from gross returns of $7,196.01 during the fis-

year April 1, 1955 to March 31, 1956 by reason of marketing noncomplying fruit outside California (Pl. Ex. 21, R. 439-440, 286). This represents a reduction of 1.23 percent of this appellant's gross receipts from all business for this fiscal year (R. 87). Appellant South Florida Growers Association, Inc., claims a reduction in gross income on noncomplying fruit transshipped to other western markets as follows: 1954—$554.33, representing .037 percent of this appellant's total gross income; 1955—$210.62, representing .012 percent of total gross income; and 1956—$821.62, representing .047 percent of total gross income (Pl. Ex. 17, R. 436, 230; R. 85).

Accepting as true the allegations of appellants' complaint and the evidence presented by their corporate officers,[3] appellee filed motions to dismiss the action as to both appellants (R. 44, 78). Appellee urged in support of his motions to dismiss that appellants' case was not within the equity jurisdiction of the district court because of failure to meet the "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. 582, 593) of great and immediate irreparable harm which a litigant must satisfy before a federal court will exercise its

[3] Appellants complained in their Jurisdictional Statement that to the extent that the decision of the district court is of a factual nature, it is somehow incorrect. Jurisdictional Statement, p. 7. However, a motion to dismiss, like a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, may be based on pleadings, depositions and affidavits if there is no genuine issue as to material facts controlling the questions raised by the motion to dismiss. See, *e.g.*, *Spielman Motor Company* v. *Dodge*, 295 U. S. 89, 91-92; *Ex parte La Prade*, 289 U. S. 444, 452. Significantly, appellants cite no specific factual basis of the decision below which they claim to be erroneous.

powers of equity to interfere with the enforcement of state laws (R. 78, 44 et seq.). See, *e.g.*, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Douglas* v. *Jeannette*, 319 U. S. 157, 164. Other grounds for appellants' motions to dismiss were that the complaint fails to show that the matter in controversy exceeds the sum or value of $3,000 within the purview of 28 U. S. C. Sec. 133, and that the complaint fails to show that the action or proceeding arises under any act of Congress regulating commerce within the purview of 28 U. S. C. Sec. 1337 (R. 44-45, 78-79). Alternatively, appellees moved the court to hold the case in abeyance pending an authoritative interpretation of California law by California courts (R. 45, 79). See *e.g.*, *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639; *Martin* v. *Cross*, 360 U. S. 219.

The district court dismissed the complaint on the ground that it had no jurisdiction because of the absence of a presently existing controversy between the parties. *Florida Lime & Avocado Growers* v. *Jacobsen*, 169 F. Supp. 774. The court's conclusion is summed up as follows:

> "There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual controversy could arise only if there were a co-existence of four facts, namely:
>
> "1. The bringing of avocados to California by plaintiff;

"2. The failure of avocados to meet the standards fixed by law;

"3. The refusal of the plaintiff to recondition or remove the avocados; and

"4. An election by plaintiffs to contest the abatement in the state courts as provided by Section 785 [of the California Agricultural Code]. 169 F. Supp. at 776."

No request for leave to amend the complaint was made, nor did appellants seek rehearing, following dismissal of the case (R. 1-3). On February 12, 1959, appellants filed a direct appeal from the judgment of dismissal entered January 13, 1959, by a single district court judge (R. 104).[4]

[4] The complaint names as defendants the Governor, Attorney General and the Director of Agriculture of the State of California (R. 4). The action abated as to the defendants Governor and Attorney General, who vacated their respective state offices on January 5, 1959, the District Court by order of February 20, 1959, having refused to join their successors in office as defendants (R. 109). *United States* v. *Boutwell*, 17 Wall. 604.

SUMMARY OF ARGUMENT

I. Appellants' Case is Not Within the Jurisdiction of the Court.

Direct appeal to this court cannot be taken under 28 U. S. C. Sec. 1253 unless the action is one required to be heard and determined by a district court of three judges. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. 28 U. S. C. 2281 provides that only a district court of three judges may grant an injunction restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." This section does not govern all suits in which the object is to restrain the enforcement of state legislative action, but only those cases coming within its terms. *Ex parte Collins*, 277 U. S. 565, 568-569.

California Agricultural Code Section 792 establishes maturity and quality standards for avocados and provides in relevant part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, * * *." Appellants are Florida corporations handling avocados grown in Florida, and attack the state statute on the grounds that it violates the Equal Protection Clause and the Commerce Clause of the United States Constitution (R. 4, 219, 281). Appellants combine these two constitutional arguments with an assertion that the California statute conflicts with the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246; 7 U. S. C. Secs. 601-659 (R. 4). An assertion that a state statute is invalid because it conflicts

with a controlling federal statute is not a ground of unconstitutionality of the statute within the meaning of 28 U. S. C. Sec. 2281. *Ex parte Buder*, 271 U. S. 461.

Where the only ground for seeking injunctive relief is that the state statute conflicts with the federal statute, a three-judge court is not required and a direct appeal will not lie to the Supreme Court. *Ex parte Buder*, 271 U. S. 461. Conversely, when the jurisdiction of the district court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to the Supreme Court is the only method of review. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 52. Where, as in the instant case, a ground of unconstitutionality is joined with the ground that the state statute conflicts with a controlling federal statute, the injection of the nonconstitutional ground should render inapplicable the three-judge requirement of 28 U. S. C. 2281. To interpret Section 2281 otherwise would produce an anomalous result. If the plaintiff joins a nonconstitutional ground to the complaint, it is likely that the case will be decided on that ground if at all possible. The avoidance of constitutional questions where possible is a rule that is basic in the federal judicial system. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 570. Thus to permit a three-judge court to be convened for the purpose of deciding a nonconstitutional question would extend, rather than limit,

the scope of Section 2281, a statute heretofore ... scribed by the Court "as an enactment technical in ... strict sense of the term and to be applied as such." *Phillips v. U. S.*, 312 U. S. 246, 250-251. Though ... roneously convened, the judgment of the three-judge district court is valid and appellants' appeal must ... taken to the appropriate court of appeals, with review thereafter in proper cases to this Court. *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368.

II. Appellants' Case Fails to Show the Existence of a Case or Controversy.

Since 1954, when appellants first began marketing Florida avocados in California, approximately 96 percent of all avocados shipped by appellants to California passed the 8 percent maturity oil test, and were sold in California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). Those lugs of avocados which failed upon inspection to comply with state law were voluntarily transshipped by appellants for sale in neighboring western markets (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, R. 439, 286). None of appellants' avocados were seized by California authorities (Pl. Ex. 22, R. 441, 287), nor did appellants at any time violate California law. Appellants make no claim of personal wrongdoing against appellee regarding past shipments to California, and these transactions are closed. While appellants desire in the future to market low oil content avocados which

may not comply with California statute, they have never actually done so. No threatened interference with appellants' rights appear beyond that implied by the existence of the California statute. A general threat that public officers will enforce the laws they are charged to administer is not sufficient to create a justiciable controversy, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88. Appellants' grievance with the statute does not create a case or controversy since, in the absence of a personal wrong, a state officer may not be sued in a representative capacity in order to test the constitutionality of a state statute. *Fitts* v. *McGhee*, 172 U. S. 516, 530; *Ex parte Young*, 209 U. S. 123, 157.

Realistically, appellants are seeking to establish a defense against state action which they fear that appellee may in the future assert against them in the state courts. Appellants must await such court action, or other interference by appellee with their marketing of avocados in California, before a justiciable controversy based on concrete facts will appear. *Public Service Comm'n* v. *Wycoff*, 344 U. S. 237, 248. The fact that the appellants' desires are thwarted by their own doubts does not confer a cause of action. *Willing* v. *Chicago Auditorium*, 279 U. S. 274, 289-290. These considerations compel the conclusion that appellants' case, by reason of its uncertainty, fails to show the existence of a controversy with appellee under Constitution, Article III.

III. Appellants' Case is Not Within the Equity Jurisdiction of the District Court.

Appellants are not sufficiently affected by the California avocado maturity law to warrant the interference by the injunctive powers of a federal court of equity. Over 96 percent of the avocados shipped by appellants to California complied with the statute and were freely marketed in California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). The few shipments that failed to comply with the California maturity standards were not lost to appellants but were transshipped for sale in adjoining western markets. The claimed reduction in gross return caused by such transshipments for the fiscal year April 1, 1955, to March 31, 1956, by appellant Florida Lime and Avocado Growers, Inc., amounted to $7,496.01, a reduction of only 1.23 percent of the appellants' gross receipts from all business (Pl. Ex. 21, R. 439-440, 286; R. 87). Similarly, appellant South Florida Growers Association, Inc., claims reductions in total gross income from these transshipments of .03 percent for 1954, .12 percent for 1955, and .047 percent for 1956 (Pl. Ex. 17, R. 436, 230; R. 85). None of appellants' avocado shipments have been seized by California authorities (Pl. Ex. 22, R. 441, 287) nor have appellants committed a violation of the California Fruit and Vegetable Standardization Law, California Agricultural Code, Sections 751 et seq. These circumstances show that appellants have not sustained, nor are they threatened with,

"irreparable injury" both "great and immediate" which would prompt the federal chancellor to interfere by injunction with the enforcement of the California avocado maturity statute. *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95; *American Federation of Labor v. Watson*, 327 U. S. 582, 593.

ARGUMENT

I. The Appeal Must be Dismissed Because the Case is Not Within the Jurisdiction of This Court.

Direct appeal to this court cannot be taken under 28 U. S. C. Sec. 1253 unless the action is one required to be heard and determined by a district court of three judges. *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368; *Phillips v. United States*, 312 U. S. 246; *Oklahoma Gas & E. Co. v. Oklahoma Packing Co.*, 292 U. S. 386; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16. The threshold jurisdictional question is, therefore, whether appellants' case is one that is required by 28 U. S. C. Sec. 2281 to be heard by a three-judge court.

Section 2281 provides that only a district court of three judges may grant an injunction restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." The section does not govern all suits in which the object is to restrain the enforcement of a state legislative action. *Ex parte Collins*, 277 U. S. 565, 568-569.

Appellants attack the validity of Section 792 of the California Agricultural Code on the grounds that it

violates the Equal Protection Clause and the Commerce Clause of the United States Constitution (R. 4). Appellants combine these two constitutional arguments with an assertion that the California statute conflicts with a federal statute, the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246; 7 U. S. C. Sec. 601-659 [R. 4]. An assertion that a state statute is invalid because it conflicts with a controlling federal statute is not a ground of unconstitutionality of the statute within the meaning of 28 U. S. C. Sec. 2281. *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50; *Ex parte Buder*, 271 U. S. 461.

The issue, then, is one of statutory construction: Is a three-judge court required under Section 2281 if a nonconstitutional federal ground of attack on the validity of the statute is joined with a ground of its unconstitutionality?

There is authority that where the jurisdiction of the district court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to the Supreme Court is the only method of review. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 52. Conversely, there is authority that if the only ground for seeking injunctive relief is that the state statute conflicts with a controlling federal statute, a three-judge court is not required, and a direct appeal will not lie to the Supreme Court. *Ex parte Buder*, 271 U. S. 461, and where, as in the instant case, a ground of unconstitutionality is joined

ith the ground that the state statute conflicts with federal statute, the injection of the nonconstitutional ground should render inapplicable the three-udge requirement of 28 U. S. C. 2281. If the three-udge court was improperly convened, the appeal lies to the appropriate court of appeals. *Phillips* v. *United tates*, 312 U. S. 246.

Denying a plaintiff the right to the extraordinary rocedure of a three-judge district court, if he attacks state statute on a ground other than its unconstitutionality, is consistent with the policy of close conruction which the Court has historically applied hen interpreting the scope of the three-judge requirement of 28 U. S. C. Sec. 2281 and its predecessor tatutes. See *Phillips* v. *United States*, 312 U. S. 246, 51.

The three-judge requirement of 28 U. S. C. 2281 derives from Section 17 of the act of June 18, 1910, 36 tat. 539, 557. At the time of its enactment the federal courts, except as restrained against enjoining roceedings in state courts by the act of March 2, 793, 1 Stat. 333, 334-5, had statutory authority to rant restraining orders against state officers without otice, (Act of June 1, 1872, 17 Stat. 196, 197), and to nter such interlocutory and final injunctions after otice and hearing. Act of March 2, 1793, 1 Stat. 333, 34; Act of June 1, 1872, 17 Stat. 196, 197; Equity ule 33; *Industrial Min. Guaranty Co.* v. *Electrical ecurity Co.*, 58 Fed. 732, 737 (1893). No provision was

made for expediting the hearing on a motion for injunction where a restraining order had been issued, nor was any time limitation put to the operation of the restraining order, except for the ruling of the court on motion.

In this procedural context, the Court in *Ex parte Young*, 209 U. S. 123 (1908), reaffirmed the jurisdiction of the federal courts to entertain suits to restrain the wrongful acts of state officers acting under color of state law, where the plaintiff asserted rights protected by the Constitution. In an era of increasing state regulation of commerce the *Young* decision raised a congressional concern that the solemn legislative acts of the states, and the efforts of state officers to enforce them, were being impeded by the abusive use of federal court ex parte restraining orders and interlocutory injunctions. 42 Cong. Rec. 4846 et seq. (1908); 45 Cong. Rec. 7252 et seq. (1910); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 803. The mischief as conceived by Congress lay not in the exercise of the federal jurisdiction in such cases, but in the manner of its exercise. The ameliatory legislation (Section 17 of the act of June 18, 1910, 36 Stat. 539, 557) established new procedural safeguards by requiring that a three-judge court pass on applications for interlocutory injunctions in such cases. This device of a court of special dignity, with expedited review in the Supreme Court, was taken from the act of February 11, 1903, 32 Stat. 823, which established such a

court for antitrust cases certified by the Attorney General to be of general public importance, and from the act of June 29, 1906, 34 Stat. 584, 592, which directed that a three-judge court hear any suit to restrain, set aside, or annul an order of the Interstate Commerce Commission.

To avoid the anomaly of a single judge reviewing the interlocutory decision of a three-judge court, the act of February 13, 1925, 43 Stat. 936, 938, extended the requirement of three judges to the hearing on final injunction. *Smith* v. *Wilson*, 273 U. S. 388, 390. Thereafter Congress recognized the common practice of having the case heard in the District Court on interlocutory and final injunction at the same time, (*e.g.*, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89), and by the act of June 25, 1948, 62 Stat. 869, 968, made the three-judge requirement applicable to hearings for either interlocutory or permanent injunction.

However, the right of direct appeal to the Supreme Court from three-judge court interlocutory decrees added new obligatory jurisdiction to an already overburdened court. At the suggestion of the Court, Congress by the Judiciary Act of 1925, 43 Stat. 936, transferred numerous classes of cases from obligatory review by appeal or writ of error to discretionary review by certiorari. Direct review by the Supreme Court was abolished from decisions of the district court, except in suits arising under the Federal Antitrust, Interstate Commerce, and Stockyard and Packer Acts, writs of error by the United States in

criminal cases, suits to enjoin orders of the Interstate Commerce Commission, and in suits to enjoin the enforcement of state statutes under Judicial Code Section 266.[5] The earlier 1911 Judicial Code Section 266, 36 Stat. 1087, 1162, authorized a direct appeal to the Supreme Court from a three-judge district court interlocutory order granting or denying an injunction restraining the enforcement of a state statute claimed to be unconstitutional. The right of direct appeal from a one-judge district court final judgment or decree was much broader under 1911 Judicial Code Section 238 [36 Stat. 1087, 1157], since the only requirement was that the case be one "in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." See *Shaffer* v. *Carter*, 252 U. S. 37. This broad right of direct appeal was eliminated by the Judiciary Act of 1925, 43 Stat. 936, 938, which limited direct appeals to the orders of three-judge district courts granting or denying interlocutory injunctions restraining enforcement of a state statute on the ground of its unconstitutionality, and from a three-judge district court order granting or denying a permanent injunction in such suits where application for the interlocutory injunction had been made. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 319-321; 66 Cong. Rec. 2917 (1925).

The Court early applied the policy of narrowing its obligatory jurisdiction as expressed in the Judiciary Act of 1925, 43 Stats. 936, when interpreting the

[5] Frankfurter & Landis, Judiciary Act of 1925, 42 Harvard Law Review 1; Judiciary Act of 1925, 43 Stat. 936, 938.

scope of the statute requiring three-judge courts to hear suits to enjoin enforcement of state statutes. *See Ex parte Buder*, 271 U. S. 461 (1926); *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317 (1926); *Smith* v. *Wilson*, 273 U. S. 388, *Ex parte Collins*, 277 U. S. 565. In addition to insuring tighter control over its own docket, this restrictive interpretation of the three-judge statute permitted the Court to receive more benefit from the illumination which serious questions derive from passing through the courts of appeals.

Congress, mindful that a severe burden was placed upon the federal judiciary by the requirement of a panel of three judges, combined with a right of direct appeal to the Supreme Court, confined this unusual procedure to "a limited class of cases of special importance and requiring special treatment in the interest of the public." *Ex parte Collins*, 277 U. S. 565, 568-569.

Mr. Justice Frankfurter, speaking for a unanimous Court, expressed the philosophy of the statute in *Phillips* v. *U. S.*, 312 U. S. 246, 250-251:

". . . The history of [Judicial Code] § 266 . . ., the narrowness of its original scope, the piece-meal explicit amendments which were made to it . . ., the close construction given the section in obedience to Congressional policy [cases cited], combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.

"To bring this procedural device into play to dislocate the normal operations of the system of

> lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases."

If a plaintiff who wishes to challenge a state statute on a nonconstitutional ground is permitted to invoke the extraordinary three-judge procedure by joining a ground of unconstitutionality, an anomalous result may obtain which would be out of harmony with the policy of close construction of Section 2281. If the plaintiff injects a nonconstitutional ground into the complaint, it is likely that the case will be decided on that ground if at all possible. The avoidance of constitutional questions where possible is a rule that is basic in the federal judicial system. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 570; *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 193. Thus to permit a three-judge court to be convened for the purpose of deciding a nonconstitutional question would extend rather than limit the scope of Section 2281.

If the suit is not one required to be heard by a three-judge court under 28 U. S. C. Sec. 2281, a direct appeal to this Court may not be taken under 28 U. S. C.

Sec. 1253. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Phillips* v. *United States*, 312 U. S. 246. Where a three-judge court is erroneously convened, the appeal from its final judgment must be taken to the appropriate court of appeals. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 at 380, 381; *Phillips* v. *United States*, 312 U. S. 246 at 254.

Appellants have not taken an appeal to the Court of Appeals for the Ninth Circuit. Since there is no case pending in the Court of Appeals, the appeal may not be considered as a petition for certiorari, as was done in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. There is no statutory authority for review of a district Court case by writ of certiorari. Since the case is not one for which a court of three judges is prescribed under 28 U. S. C. Sec. 2281, no appeal lies to this court and it is without jurisdiction to hear the merits of the appeal. *Smith* v. *Wilson*, 273 U. S. 388.[6]

[6] In *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court accepted a direct appeal from a district court in a case which joined an attack on a state regulation on the ground of its unconstitutionality under the Commerce Clause, with a charge that the regulation was in conflict with a federal statute. However, the briefs filed in the case show that the parties assumed, without argument, the appellate jurisdiction of the Court. See records in *Parker* v. *Brown*, No. 46, October Term 1942; 10 L. W. 3347. The opinion of the Court on this point merely recites "The case was tried by a district court of three judges and comes here on appeal under Sections 266 and 238 of the Judicial Code as amended, 28 U. S. C. Sections 380, 345 (now 28 U. S. C. 2281 and 1252 and 1253)." *Parker* v. *Brown*, 317 U. S. 341, 344-345. As said by Mr. Justice Sutherland in *Webster* v. *Fall*, 266 U. S. 507, 511: "The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Even more pertinent is the

II. Appellants' Case Fails to Show the Existence of a Case or Controversy.

There is no justiciable "controversy" under Article III of the Constitution unless the controversy between the parties is definite and concrete. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-241. The judicial power does not extend to the determination of abstract questions. *Ashwander v. Valley Authority*, 297 U. S. 288, 324. Claims based upon potential invasions of rights are not enough to warrant judicial intervention. *Arizona v. California*, 283 U. S. 423, 462.

It is also fundamental that an action in the federal courts against a state official charged with enforcing a statute is barred by the Eleventh Amendment unless brought against him in his individual capacity, and must be based upon an allegation of a wrong that he has individually done. *Fitts v. McGhee*, 172 U. S. 516, 529-530. As stated by Mr. Justice Peckham in *Ex parte Young*, 209 U. S. 123, 159-160, with regard to the immunity from suit of a state officer attempting to enforce an unconstitutional statute: "* * * the officer in proceeding under such enactment comes into

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statement by Chief Justice Marshall: "No question was made in that case, as to the jurisdiction. It passed sub silentio, and the Court does not consider itself as bound by that case." *United States v. More*, 3 Cranch 159 at 172, quoted in *New York v. Oklahoma*, 195 U. S. 252 at 256.

conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

The case then presents this picture: Appellants desire in the future to market avocados in California which may not comply with California law. They have never actually done so (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, R. 439, 286). In the past appellants freely sold a very high percentage of their avocados transported to California markets (supra at 5). The few lots which did not meet the California standard were voluntarily transshipped and sold in neighboring western markets (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, R. 439, 286). These circumstances show that appellants' real grievance is with the state statute, not personally against the appellee state officer. Appellants make no claim of personal wrongdoing against appellee regarding the past shipments to California, and these transactions are closed. Neither do appellants allege a controversy over any current shipments. There being no existing controversy with any state officer, the case must fail. For in the absence of a personal wrong, a state officer may not be sued in a representative capacity in order to test the constitutionality of a state statute. This device " * * * would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with

the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Fitts* v. *McGhee*, 172 U. S. 516, 530; *Ex parte Young*, 209 U. S. 123, 157.

Appellants' complaint alleges that "some of the highest grade Florida avocados, when fully mature, have oil content of less than 6 percent and as low as 2 percent . . .", and that ". . . most Florida avocados, at the time of picking permitted by the applicable laws and regulations of the United States . . . have oil content of less than the 8 percent made prerequisite to sale in California . . ." [R. 12-13].[7] No claim is made that any of the alleged low oil content varieties of avocados have been shipped to California, and over 95 percent of the varieties actually shipped were found upon inspection to comply with the state law (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; D. Ex. S., R. 445-447, 296). Thus, appellants' fears relate to the hypothetical action which appellee may take if and when appellants ship their allegedly low oil content varieties of avocados to California. As Mr. Justice McKenna stated in *Lehon* v. *Atlanta*, 242 U. S. 53, 56: "To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval."

Appellants' case is too contingent and speculative to meet the test of justiciability. Appellants are in much

[7] Appellee's answer denies these allegations (R. 27).

the same position as the federal employees in *United Public Workers* v. *Mitchell*, 330 U. S. 75, who sued to enjoin the Civil Service Commission from enforcing the Hatch Act and for a declaratory judgment holding the act unconstitutional. The federal employees involved, except one Pool, declared their desire to engage in political activity proscribed by the act, but had not actually done so. The court held that no case or controversy existed because the absence of actual violations rendered the threat of dismissal or discipline to be hypothetical, not actual.

Similarly, appellant corporations merely declare their desire to market avocados in California which may not comply with California law. They have not actually done so. They have in the past successfully sold a very high percentage of their avocados in California markets and have reshipped the few lots that did not meet the California standard to neighboring western markets. No threatened interference with appellants' rights appears beyond that implied by the existence of the statute. A general threat that officers will enforce the laws they are charged to administer is not sufficient to create a justiciable controversy. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88.

Appellants' case is distinguishable from *Evers* v. *Dwyer*, 358 U. S. 202, relied on by appellants. The plaintiff in *Evers* v. *Dwyer*, a Negro, immediately violated the Memphis segregation ordinance at the moment he seated himself in the front portion of the public bus. At this point the justiciable controversy

came into existence. The facts which would form the basis of the litigation were fixed and would never be more concrete. Regardless of how many times the plaintiff boarded a Memphis bus, his racial identity under the ordinance would be unchanged.

Appellant corporations, on the other hand, have not violated the California law. Moreover, there are no concrete facts to shape a justiciable dispute because appellants have reshipped to other markets the few lots of avocados which have failed to meet the 8 percent oil standard. Appellants seek to enjoin the enforcement of the California statute as to future shipments. But it is a matter of speculation whether the avocados in such future shipments will have insufficient oil content under the statute. Certainly appellants' past experience indicates a high probability that future shipments will be marketed freely in California (supra at 5). Only if appellants refuse to either transship or to recondition a specific lot which fails to meet the statutory standard, thereby giving rise to a specific dispute with the state or county agricultural inspectors, will the facts be as concrete as in *Evers* v. *Dwyer*, 358 U. S. 202.

Realistically, appellants are seeking to establish a defense against state action which they fear that appellee may in the future assert against them in the California courts. *Cf. Public Service Comm'n* v. *Wycoff*, 344 U. S. 237, 248; *Pub. Util. Comm'n* v. *United Air Lines*, 346 U. S. 402. In the posture of their case, appellants' argument is with the state stat-

ute, not with the appellee. It is not the action of the appellee, but the appellants' fears, which hinder their marketing of avocados in California. "The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action." *Willing* v. *Chicago Auditorium*, 277 U. S. 274, 289-290.

Should a California county agricultural commissioner or a state inspector interfere in the future with one of appellants' shipments to California, an actual controversy involving a fixed factual situation will exist, and appellants will have available to them ample legal remedies in the state courts to test the validity of the statute. The court would have before it a concrete set of facts which would limit the scope of the legal determination, would aid in the formulation of the precise constitutional issue to be decided, and would add to its weight as precedent. These considerations compel the conclusion that appellants' case, by reason of its uncertainty, fails to show the existence of a controversy with appellee under Constitution, Article III.

III. Appellants' Case is Not Within the Equity Jurisdiction of the District Court.

The principal ground for appellee's motion to dismiss below was that appellants did not meet the "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. 582, 593) of great and immediate irreparable harm which a litigant must satisfy before a federal court will exercise its powers of equity to

interfere with the enforcement of state laws. *E.g.*, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Douglas* v. *Jeannette*, 319 U. S. 157, 164.

This ground for dismissing the action assumes the existence of a justiciable controversy which the district court has authority to hear and decide. It raises the further question whether the district court should exercise its equitable powers, which of course are discretionary in nature. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593; *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; *Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U. S. 639. The district court below, by deciding that no case or controversy existed, did not reach the subsidiary question whether appellants had shown sufficient equity to warrant the exercise of the court's jurisdiction. If it were decided that a case or controversy under Article III is present, the question would be open to the district court whether it should exercise its discretionary powers of equity.

The nub of appellee's argument that the action should be dismissed for lack of equity is simply that appellants are not sufficiently affected by the California avocado maturity law to warrant the interference by a federal court of equity with its enforcement. The evidence presented by appellants' principal corporate officers, which appellee accepted as true for the purpose of the motions to dismiss, show convincingly that the statute under attack has only a slight effect on appellants' business operations. See pages 5 to 7, *supra*. Over 96 percent of all avocados shipped

by appellants to [illegible]ornia complied with the statute and were freely [illegible]keted in California. [Pl. Ex. 17, R. 436, 230; Pl. Ex. 19; R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286.] The few lots that failed to comply with the California maturity standards were not lost to appellants. They were transshipped to other western markets outside California at claimed losses which are almost *de minimus* relative to the volume of appellants' business operations. See pages 5 to 7, supra. *Cf., Alabama* v. *Arizona*, 291 U. S. 286, 292.

In the view of appellee, this hardly constitutes the kind of "irreparable injury" both "great and immediate" which should prompt the federal chancellor to interfere with the enforcement of state laws. *Spielman Motors Co.* v. *Dodge*, 295 U. S. 89, 95.

Appellee's position is supported by such Supreme Court cases as *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, and *Douglas* v. *Jeannette*, 319 U. S. 157. The Court in all these cases has recognized the extraordinary nature of a remedy that interferes with the enforcement of state laws by state officials. The policy of caution followed by federal courts in this type of case was stated eloquently by Mr. Justice Cardozo in *Hawks* v. *Hamill*, 288 U. S. 52, 61: "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance

there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin (Cases cited.)"

Mr. Chief Justice Hughes noted that only in "exceptional circumstances" would a federal court exercise its equitable powers against the enforcement of state laws. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. Mr. Justice Douglas has observed that it is a "strict test" that must be satisfied. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593.

The recent case of *Doud* v. *Hodge*, 350 U. S. 485, contains a factual picture that contrasts sharply with the position of appellant corporations. In *Doud* v. *Hodge*, the plaintiff's business consisted exclusively of selling and issuing money orders in the State of Illinois, through such agents as retail drug, hardware and grocery stores. Plaintiff's entire business was regulated and affected by the statute under attack, and plaintiff could not conduct his business operation in any respect without violating the statute.

By contrast, appellant corporations have operated their entire businesses without ever having violated the California statute, the enforcement of which they have asked a federal court to enjoin. The picture presented by appellants, even when stated favorably to them, is as follows: In one of their markets—California—appellants have marketed a substantial volume of one of their products—avocados—but hesitate to increase that volume with fruit from Florida that

may not meet the California avocado maturity law. Instead of showing great and immediate irreparable injury, appellants' case looks to possible future harm. This concern is suggested by appellants' Jurisdictional Statement, in which they anticipate detriment as "avocado trees planted in Florida in recent years come into fruition." (Jurisdictional Statement, p. 15) Neither appellants, nor any other Florida handler, had made any commercial shipments of Florida avocados to California during the period from March 1, 1958, to February 5, 1959.* Affidavit of Whipple, Exhibit "A" to appellee's opposition to appellants' motion to amend complaint. [R. 102.]

It is significant that appellants have never applied for interlocutory relief during the two years that have elapsed since they filed their complaint. This is a further indication that appellants are not suffering the kind of immediate injury which will prompt a federal court to exercise its equitable powers in a suit to enjoin public officers from the enforcement of a state law.

Adequate remedies other than a request for injunctive relief by a federal district court of three judges, with all its burden on the federal judiciary, have been and now are available to appellants. For example, if a justiciable controversy exists, appellants could have sought declaratory relief in the Superior Court of the State of California. *Lord* v. *Garland*,

*Appellants indicate that the reason there have been no avocado shipments to California recently is that the 1957-1958 crop of Florida avocados was disposed of by March 1, 1958, and that the winds and frosts of early 1958 decimated the 1958-1959 crop. Appellants' Answer to Motion to Dismiss or Affirm, fn., p. 5.

27 Cal. 2d 840, 168 P. 2d 5. Under this remedy, appellants are entitled to an expeditious hearing of their case. (California Code of Civil Procedure Sec. 1062a. Indeed, if a case or controversy exists, appellants could seek declaratory relief without an injunction from a single federal district judge under 28 U. S. C. 2201.

Moreover, at any time that appellants were given notice by California law enforcement officers that a given lot of avocados was in noncompliance with the 8 percent oil law, appellants could have taken immediate action to challenge the California law in a concrete factual context. See procedure authorizing court order releasing seized shipments in California Agricultural Code Section 785. By transshipping noncomplying fruit to other western markets, appellants have intentionally avoided a test of the validity of the California avocado maturity statute. Appellants' case simply does not show the existence of equity jurisdiction in the district court.

CONCLUSION

For the reasons stated it is respectfully submitted that this court lacks jurisdiction of the case, and that the appeal must be dismissed. If jurisdiction exists, the judgment of dismissal by the court below is correct and should be affirmed.

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APPENDIX A

California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom.

Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner."

California Agricultural Code, Section 785.6:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

California Agricultural Code, Section 792:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

California Agricultural Code, Section 831:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

California Administrative Code, Title 3, Section 1366.2:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes

to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or re-marked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

California Administrative Code, Title 3, Section 1397.6:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpose of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered

as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better. (Rev. 5 57)"

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SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1959.

Florida Lime and Avocado Growers, Inc., et al., Appellants, v. Jacobsen, Director of the Department of Agriculture of the State of California, et al.	On Appeal From the United States District Court for the Northern District of California.

[March 7, 1960.]

Mr. Justice Whittaker delivered the opinion of the Court.

Appellants, engaged in the business of growing, packing, and marketing in commerce, Florida avocados, brought this action in the District Court of the United States for the Northern District of California to enjoin respondents, state officers of California, from enforcing § 792 of the California Agricultural Code.[1]

Section 792 prohibits, among other things, the importation or sale in California of avocados containing "less than 8 per cent of oil, by weight of the avocado excluding the skin and the seed." The complaint alleged, *inter alia*, that the varieties of avocados grown in Florida do not normally, or at least not uniformly, contain at maturity as much as 8% of oil by weight; that in each year since 1954 appellants have shipped in interstate commerce, in full compliance with the Federal Agricultural Marketing Agreement Act of 1937[2] and Florida Avocado Order No. 69 issued under that Act by the Secretary of Agriculture on June 11, 1954, Florida avocados into the State

[1] Deering's Agricultural Code of the State of California, 1950, § 2 Div. 5, of West's Ann. California Agricultural Code.

[2] 50 Stat. 246, 7 U. S. C. § 601 *et seq.*

of California and have attempted to sell them there; that appellees, or their agents, have consistently barred the sale of appellants' avocados in California for failure uniformly to contain not less than 8% of oil by weight, resulting in denial to appellants of access to the California market, and forcing reshipment of the avocados to and their sale in other States, to the injury of appellants, all in violation of the Commerce and Equal Protection Clauses of the United States Constitution as well as of the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69 issued thereunder.

Inasmuch as the complaint alleged federal unconstitutionality of the California statute, appellants requested the convening of, and there was convened, a three-judge District Court pursuant to 28 U. S. C. § 2281 to hear the case. After hearing, the court concluded that, because appellants had not contested the validity of § 792 but sought abatement of appellees' condemnation of the avocados in the California state courts, the case presented "no more than a mere prospect of interference posed by the bare existence of the law in question," and that it had "no authority to take jurisdiction [and was] left with no recourse other than to dismiss the action," which it did. 169 F. Supp. 774, 776. Appellants brought the case here on direct appeal under 28 U. S. C. § 1253, and we postponed the question of our jurisdiction to the hearing on the merits. 360 U. S. 915.

The first and principal question presented is whether this action is one required by § 2281 to be heard by a District Court of three judges and, hence, whether we have jurisdiction of this direct appeal under § 1253.

Section 2281 provides[1] that an injunction restraining the enforcement of a state statute may not be granted

[1] 28 U. S. C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining

pon the ground of unconstitutionality of such statute
nless the application therefor is heard and determined
' a district court of three judges . . . ." and § 1253 pro-
des ' that any order, granting or denying an injunction
any civil action required by any Act of Congress to be
ard and determined by a District Court of three judges,
ay be appealed directly to this Court.

Appellees concede that if the complaint had attacked
92 *solely* on the ground of conflict with the United
ates Constitution, the action would have been one,
quired by § 2281 to be heard and determined by a Dis-
ct Court of three judges. But appellees contend that
cause the complaint also attacks § 792 on the ground of
nflict with the Federal Agricultural Marketing Agree-
nt Act of 1937 and the Secretary's Florida Avocado
der No. 69, it is possible that the action could be deter-
ned on the statutory rather than the constitutional
ound, and, therefore, the action was not required to be
ard by a District Court of three judges under § 2281
d hence, a direct appeal does not lie to this Court under
253.

Section 2281 seems rather plainly to indicate a con-
ssional intention to require an application for an
unction to be heard and determined by a court of three

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n of any officer of such State in the enforcement or execution
uch statute or of an order made by an administrative board or
mission acting under State statutes, shall not be granted by any
rict court or judge thereof upon the ground of the unconstitution-
of such statute unless the application therefor is heard and
rmined by a district court of three judges under section 2284 of
title."

8 U. S. C. § 1253 provides:

Except as otherwise provided by law, any party may appeal to
Supreme Court from an order granting or denying, after notice
hearing, an interlocutory or permanent injunction in any civil
n, suit or proceeding required by any Act of Congress to be
d and determined by a district court of three judges."

judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. The reason for this is quite clear. The impetus behind the first three-judge court statute was the decision in *Ex parte Young*, 209 U. S. 123 (1908), in which it was held that a federal court could enjoin a state officer from enforcing a state statute alleged to be unconstitutional, despite the prohibition of the Eleventh Amendment concerning suits against a State. Debate was immediately launched in the Senate with regard to cushioning the impact of the *Young* case, the principal concern being with the power thus activated in one federal judge to enjoin the operation or enforcement of state legislation on grounds of federal unconstitutionality.[1]

[1] In the Senate debates Senator Overman of North Carolina commented as follows:

"This measure proposes that whenever a petition is presented to a circuit judge before whom it is presented shall, before granting the injunction, call in one circuit judge and one district judge or another circuit court judge, making three judges who shall pass upon the question of the injunction.

"We think, sir, that if this could be done it would relieve intense feeling in the States. As was said by Mr. [illegible] in his dissenting opinion in the Minnesota case (*Ex parte* [illegible]) 'We have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce a statute of the State passed by the legislature of his own State, practically suspending for a time the laws of the State. That is the cause of the [illegible] being great feeling among the people of the States because of the fact that one Federal judge has tied the hands of a sovereign State and enjoined in this manner the great officer who is charged with the enforcement of the laws of the State, causing almost [illegible] as it did in my State, and in order to allay this feeling [illegible] statute is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three great [illegible] the statute is unconstitutional, the officers of the State will be inclined to resist the orders and decrees of our Federal courts. The people and the courts of the State are more inclined to abide by the decision of three judges than they would of one [illegible]

The result of the debates on this subject was passage of a three-judge court statute in 1910, 36 Stat. 557, which was codified as § 266 of the Judicial Code, 36 Stat. 1162. This statute prohibited the granting of an interlocutory injunction against a state statute upon grounds of federal unconstitutionality unless the application for injunction

[illegible] Federal judge who simply upon petition or upon a hearing [illegible] to the hands of a State officer from proceeding with the enforcement of the laws of his sovereign State. 42 Cong. Rec. 847.

And Senator Bacon of Georgia remarked:

The purpose of the bill is to throw additional safeguards around the exercise of the enormous powers claimed for the subordinate Federal courts. If these courts are to exercise the power of stopping the operation of the laws of a State and of punishing the officers of a State then at least let it be done on notice and not hastily and submit to the judgment of three judges to decide such questions and not permit such dangerous power to one man.

The necessity for this legislation is a very grave one. It is a most serious trouble which now exists that by the action of one judge the machinery of State laws can be arrested. 42 Cong. Rec. 863.

Section 266 of the Judicial Code originally provided in pertinent part:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge and the other two may be other circuit or district judges, and unless a majority of said three judges shall concur in granting such application. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. 36 Stat. 1162.

was heard and determined by a court of three judges. The statute also contained its own provision for direct appeal to this Court from an order granting or denying an interlocutory injunction. The objective of § 266 was clearly articulated by Mr. Chief Justice Taft in *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Comm'n*, 260 U. S. 212:

> "The legislation was enacted for the manifest purpose of taking away the power of a single United States Judge, whether District Judge, Circuit Judge or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the state pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. Pending the application for an interlocutory injunction, a single judge may grant a restraining order to be in force until the hearing of the application but thereafter, so far as enjoining the state officers, his power is exhausted. The wording of the section leaves no doubt that Congress was by provision *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated." 260 U. S., at 216.

In 1925, § 266 was amended to require a three-judge court for issuance of a permanent as well as an interlocutory injunction, and § 238 of the Judicial Code (a broad stat-

governing direct appeals to this Court from District Courts) was amended, so far as here pertinent, to incorporate the provision for direct appeals to this Court from the orders of three-judge courts granting or denying an injunction in a § 266 case. 43 Stat. 938. Such is the present scheme of §§ 2281 and 1253.

With this background, it seems entirely clear that the central concern of Congress in 1910 was to prevent one federal judge from granting an interlocutory injunction against state legislation on grounds of federal unconstitutionality. And the 1925 amendment requiring a court of three judges for issuance of a permanent as well as an interlocutory injunction "was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction." *Stratton v. St. Louis Southwestern R. Co.*, 282 U. S. 10, 14. Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a nonconstitutional ground of attack was also alleged, and this might well defeat the purpose of § 2281.

Cases in this Court since *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the

statute.[7] These cases represent an unmistakable recognition of the congressional policy to provide for a three-judge court whenever a state statute is sought to be enjoined on grounds of federal unconstitutionality, and this consideration must be controlling.

[7] See, e. g., *Van Dyke* v. *Geary*, 244 U. S. 39; *Cavanaugh* v. *Looney*, 248 U. S. 453; *Lemke* v. *Homer-Farmers Elevator Co.*, 258 U. S. 50; *Lemke* No. 1; *Chicago, Great Western R. Co.* v. *Kendall*, 266 U. S. 94; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *Herkness* v. *Lord*, 270 U. S. 92; *Sterling* v. *Constantin*, 287 U. S. 378; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388; *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621; *Phillips* v. *United States*, 312 U. S. 341.

In the *Garrett* case, the following observations were made by Mr. Justice Hughes:

"Because of the Federal questions raised by the bill the Circuit [District] Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its unconstitutionality. The reference, undoubtedly, is to an enactment in conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, when such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pendente lite. The local questions arising under the state constitution and statutes were therefore before the Circuit [District] Court and the appeal brings them here." 231 U. S., at 303-304.

"In *Sterling* v. *Constantin*, 287 U. S. 378, for example, certain state administrative orders were sought to be enjoined on the ground that they violated both the State and Federal Constitutions. The

Appellees place some reliance on *Ex parte Buder*, 271 U. S. 461, and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (*Lemke I*), in support of their position. *Buder* held merely that a claim of conflict between a state statute and a federal statute was not a constitutional claim requiring the convening of a three-judge court under § 266, and thus there could be no direct appeal here. *Buder* did not, however, require that a constitutional claim be the sole claim before the three-judge court. *Lemke I* held that it was permissible to appeal to the Court of Appeals rather than directly to this Court from the final order of a single district judge in a case in which a state statute was attacked on the grounds that it was both unconstitutional

Governor of the State had declared martial law in an effort to enforce the orders, and his action was also challenged on the ground that the statute purporting to confer such authority on him was in violation of the State and Federal Constitutions. With regard to the jurisdiction of the three-judge court which had been convened for the purpose of considering an application for injunction, Mr. Chief Justice Hughes said:

"As the validity of the provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530. The jurisdiction of the District Court, so constituted and of this Court upon appeal, extends to every question involved whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." 287 U. S., at 303-304.

In *Phillips* v. *United States*, 312 U. S. 246, it was held that a suit by the United States to enjoin the action of a Governor in interfering with the construction of a state power project using federal funds was not within § 266 because the validity of a state statute or order had not been challenged. *Sterling* v. *Constantin* was distinguished on the ground that it involved an attempt to restrain the action of a Governor as part of a main objective to enjoin execution of certain administrative orders as violative of the State and Federal Constitutions. As such, *Sterling* was said to have been "undoubtedly within § 266." 312 U. S., at 253.

and in conflict with a federal statute. The case was decided under § 238, which, until 1925, was a broad statute calling for a direct appeal to this Court from the action of a District Court "in any case that involves the construction or application of the Constitution of the United States . . . and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." The breadth of § 238 had led the Court on several occasions to construe this provision to mean that a direct appeal to this Court was required only when the *sole* ground of District Court jurisdiction was the federal constitutional claim involved. *Union Planters' Bank* v. *Memphis*, 189 U. S. 71, 73; *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318, but if jurisdiction was based both on a constitutional ground and some other federal ground the appeal might properly be taken either to this Court or to the Court of Appeals. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407–408; *McFadden* v. *United States*, 213 U. S. 288, 293. *Lemke I*, decided in 1922, merely followed this line of decisions, and was not in any way concerned with a direct appeal to this Court under § 266 from the order of a three-judge court—the question now before us.

The distinction between the scope of our direct appellate jurisdiction under § 238 and § 266 prior to 1925 was effectively illustrated by the differing course of events in *Lemke I* and *Lemke* v. *Homer Farmers Elevator Co.*, 278 U. S. 65 (*Lemke II*). Both cases involved an attack on a state statute on grounds of federal unconstitutionality and conflict with a federal statute. In both, interlocutory injunctions were sought before three-judge courts, and the injunctions were granted. *Lemke I*, however, also sought a permanent injunction before a single district judge, and, from his order denying the injunction, the case was appealed to the Court of Appeals before coming here. *Lemke II*, on the other hand, was directly

appealed to this Court under § 266 from the interlocutory order of the three-judge court. As indicated, this Court held that the final order of the single judge in *Lemke I* was properly appealed to the Court of Appeals *under* § *238* because of the additional nonconstitutional basis for District Court jurisdiction. But in *Lemke II* this Court took jurisdiction over all issues presented in the direct appeal *under* § *266* from the interlocutory order of the three-judge court. See also *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, a case virtually identical with *Lemke II*, in which this Court also took jurisdiction over all questions in a § 266 direct appeal from an interlocutory injunction granted by a three-judge court.

The problem was greatly simplified in 1925 when § 266 was amended to require three-judge courts for the granting of both interlocutory and permanent injunctions on grounds of federal unconstitutionality, and § 238, while substantially amended to reduce the scope of our general appellate jurisdiction, so far as here pertinent, merely incorporated the provision for direct appeals to this Court from injunctions granted or denied under § 266. We do not find in these amendments any intention to curtail either the jurisdiction of three-judge courts or our jurisdiction on direct appeal from their orders. Indeed, the cases since 1925 have continued to maintain the view that if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as do we on direct appeal, over *all* grounds of attack against the statute. *E. g., Sterling* v. *Constantin*, 287 U. S. 378, 393-394; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621, 625, n. 5.

To hold that only one judge may hear and decide an action to enjoin the enforcement of a state statute on both constitutional and nonconstitutional grounds would be

to ignore the explicit language and manifest purpose of § 2281, which is to provide for a three-judge court whenever an injunction sought against a state statute may be granted on federal constitutional grounds. Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged we think the case is one that is "*required* by . . . Act of Congress to be heard and determined by a district court of *three* judges." 28 U. S. C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

We turn now to the merits. The Court is of the view that the District Court was in error in holding that because appellants had not contested the validity of § 792 nor sought abatement of appellees' condemnation of their avocados, there was no "existing dispute as to present legal rights," but only "a mere prospect of interference posed by the bare existence of the law in question [§ 792]," and in accordingly dismissing the action for want of jurisdiction. As earlier stated, the complaint alleges that, since the issuance of the Secretary's Florida Avocado Order No. 69 in 1954, appellants have made more than a score of shipments in interstate commerce of Florida avocados to and for sale in California, and appellees, or their agents, have in effect consistently condemned those avocados for failure to contain 8% of more of oil by weight, thus requiring appellants—to prevent destruction and complete loss of their shipments—to reship the avocados to and sell them in other States, all in violation of the Commerce and Equal Protection Clauses of the United States Constitution as well as the Marketing Agreement Act of 1937. It is therefore evident that there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the

merits. In these circumstances, the fact that appellants did not contest the validity of § 792 nor seek abatement of appellees' condemnation of the avocados in the California state courts—which, because of the time period necessarily involved would have resulted in the complete spoilage and loss of the product—does not constitute an impediment to their right to seek an injunction in the federal court against enforcement of § 792 on the ground that it violates both the Constitution of the United States and the Federal Agricultural Marketing Agreement Act of 1937.

The judgment is therefore reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS joins in the part of the opinion that passes on the merits, the Court having held, contrary to his view, that the case is properly here on direct appeal from a three-judge court.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1959.

Florida Lime and Avocado Growers, Inc., et al., Appellants. v. Jacobsen, Director of the Department of Agriculture of the State of California, et al.	On Appeal From the United States District Court for the Northern District of California.

[March 7, 1960.]

Mr. Justice Frankfurter, whom Mr. Justice Douglas joins, dissenting.

The statute providing for three-judge Federal District Courts, with direct appeal to this Court, in cases seeking interlocutory injunctions of the operation of state statutes on constitutional grounds was enacted in 1910. 36 Stat. 557. It was amended in 1925 to apply to applications for final as well as interlocutory injunctive relief. 43 Stat. 938. Since that time this Court has taken jurisdiction by way of direct appeal in several cases like the present one where a state statute was sought to be enjoined both on federal constitutional and non-constitutional grounds. See *Hodges* v. *Iron*, 278 U. S. 92; *Sterling* v. *Constantin*, 287 U. S. 378, 393 (limited in *Phillips* v. *United States*, 312 U. S. 246); *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Parker* v. *Brown*, 317 U. S. 341.[1] In none of these cases, however, was our jurisdiction challenged by

[1] Prior to the 1925 extension of this three-judge court statute to applications for final injunctions, there were also cases like the present one where non-constitutional as well as constitutional questions were made, in which the Court accepted jurisdiction. See *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298; *Lemke* v. *Farmers Grain Elevator Co.*, 258 U. S. 50; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 433. In none of these cases, however, except *Louisville & Nashville R. Co.* v. *Garrett*, was

the litigants because non-constitutional as well as constitutional relief was sought, or did the Court notice the existence of a question as to our jurisdiction on that score. We should therefore feel free to apply Mr. Chief Justice Marshall's approach in a similar situation to unconsidered assumptions of jurisdiction: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case." *United States* v. *More*, 3 Cranch 159, 172. See also Mr. Chief Justice Marshall in *Durousseau* v. *United States*, 6 Cranch 307, and Mr. Justice Brandeis dissenting in *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 135, n. 21: "It is well settled that the exercise of jurisdiction under such circumstances [where counsel did not question our jurisdiction] is not to be deemed a precedent when the question is finally brought before us for deter-

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any attention whatsoever to jurisdictional considerations, and in the case there was no direct challenge to this Court's jurisdiction of the whole case under the three-judge statute on the ground that both constitutional as well as constitutional claims were made. But there is an even more fundamental reason for discounting these pre-1925 cases as authority regarding the jurisdictional problem in the present case. As *Garrett* and these other cases were decided prior to the 1925 Jurisdictional Act, which drastically shrunk this Court's jurisdiction on appeal, they arose at a time when the scope of direct appellate jurisdiction here over decisions of ordinary one-judge District Courts was much broader than it now is, and in fact applied to all cases of the Judicial Code to all constitutional cases, including cases like the present one involving federal statutory grounds for relief in addition to constitutional grounds." *See Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407–408; *Machadden* v. *United States*, 1 U. S. 288. Thus the results in these pre-1925 cases, permitting the same scope of direct appeal to this Court in three-judge cases as was then permitted in one-judge cases, were not as obviously out of harmony with the scheme of the federal judicial system in their day as I believe the decision is which the Court makes today.

mination." [1] I therefore approach the question of our jurisdiction in the present case as open, calling for a thorough canvass of the relevant jurisdictional factors. The Court does not undertake such a canvass, but relies instead upon the cases cited and upon what it deems explicit statutory language and plainly manifested congressional intent. Consideration of what are to me the relevant factors leads me to dissent from the Court's conclusion that we have direct appellate jurisdiction in this case.

Appellants' complaint seeks injunction of the operation of § 792 of the California Agricultural Code on the grounds that it is in conflict with the Federal Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 601 *et seq.*, and the Commerce and Equal Protection Clauses of the United States Constitution. The complaint requested the convening of a three-judge District Court to adjudicate these claims. A three-judge court was convened and, after hearing, it entered a judgment dismissing the action on the ground that no justiciable controversy existed. 169 F. Supp. 774. A direct appeal was taken to this Court pursuant to 28 U. S. C. § 1253. The Court now holds that three judges were required to adjudicate appellants' claims below and that we therefore have jurisdiction to decide this appeal on its merits.

The statute governing our direct appellate jurisdiction from decisions of three-judge District Courts is 28 U. S. C. § 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order

[1] The Court's Rules 15 (e) (1) and 23 (e) emphasize the doctrine that a *sub silentio* exercise of jurisdiction is not controlling as precedent. Only the questions set forth in the jurisdictional statement or petition, or fairly comprised therein will be considered by the Court.

granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Whether the present case was a "proceeding required to be heard and determined by a district court of three judges," and therefore within our direct appellate jurisdiction, depends upon the meaning to be given to 28 U. S. C. § 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

I start with the proposition, as I understand the Court to do, that whether a case is one directly appealable here under 28 U. S. C. § 1253 depends upon the complaint and not upon the result in the District Court. If three judges are required to hear the claims which are made then we have direct appellate jurisdiction to review their decision even though it be on non-constitutional grounds. If three judges are not required in view of the complaint and the case is determinable by a single judge, we have no jurisdiction by way of direct appeal under § 1253 even though the decision be a constitutional one.

In this case the complaint did not attack the Florida statute solely on the ground of its conflict with the Commerce and Equal Protection Clauses of the Constitution.

t also attacked it because of its asserted conflict with
he Federal Agricultural Marketing Agreement Act of
937, a claim which in the first instance requires con-
truction of both the Federal Act and the California
tatute and which for purposes relevant to our issue is
ot a constitutional claim. *Ex parte Buder*, 271 U. S.
61. The question thus presented is whether three judges
re to be required, with a consequent direct appeal to
his Court, merely because a constitutional claim is made
although it is joined with claims that may dispose of the
ase on essentially statutory and perchance local statu-
ory grounds. The Court decides that three judges are
equired in such a case. I would hold that there are
equired to be three judges and a direct appeal to this
ourt only when the exclusive ground of attack upon a
tate statute is direct and immediate collision with the
onstitution, thus seeking a constitutional decision in
rder that relief be granted.

Neither my position nor the Court's is entirely satisfac-
ory. My view would leave it open for a single district
dge to enjoin a state statute on the ground of its uncon-
titutionality if the complaint also contains non-constitu-
ional grounds for relief. As the Court points out, such
result would conflict with the superficial literal sense
f 28 U. S. C. § 2281 that an "injunction restraining the
nforcement . . of any State statute . . . shall not be
ranted by any district court . . . upon the ground of the
nconstitutionality of such statute unless the application
herefor is heard and determined by a district court of
hree judges . . . ." The effect of the Court's decision,
n the other hand, is to require the convening of a three-
dge court, with the concollary right of direct appeal of its
ecision to this Court, in cases where, as a consequence of
he presence of a substantial non-constitutional ground for
elief, the constitutionality of a state statute will play no
art in the decision either in the District Court or in this

Court. There can be expected to be many such cases. For an example of one of them see *Herkness* v. *Deer*, 278 U. S. 92. It can fairly be stated, and with this I understand the Court fully to agree, that in devising the three-judge District Court scheme relating to state legislation Congress was concerned with providing appropriate safeguards against the invalidation of state legislation on constitutional grounds. I am therefore put to a choice between holding this three-judge procedure applicable to a large class of non-constitutional cases, where the unusual demands which that procedure makes upon the federal judicial system were never thought justifiable by Congress, and departing from the strictly literal scope of § 2281 in order to restrict the scope of this three-judge procedure with a view to preventing its operation outside of its proper constitutional sphere. I am led to choose the latter by considerations which are to me controlling, namely, considerations bearing on the efficient operation of the federal judicial system. For I do not feel myself compelled to disregard these considerations either by inelastic statutory language or by any unambiguous evidence of congressional purpose to the contrary.

What jurisdictional result in a case like this is most likely to comport best with the operation of the federal judicial system is to be determined with regard to two general and conflicting considerations, both of which are directly relevant to a construction of the provisions respecting three-judge District Courts in the context of the present situation. On the one hand is the policy which gave rise to the creation of the three-judge requirement in these cases, protection against the improvident invalidation of state regulatory legislation was sought to be achieved by resting the fate of such legislation in the first instance in the hands of three judges, one of whom must be a circuit judge (or, originally, a Justice of this Court), rather than in a single district judge.

See Pogue, State Determination of State Law, 41 Harv. L. Rev. 623; Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795. And direct appeal to this Court was provided, instead of the usual route from District Court to Court of Appeals, not only to avoid the incongruity of three judges reviewing three judges, but also to hasten ultimate determination of the validity of the legislation and to avoid the delay and waste of time during which the operation of legislation eventually held to be valid might be restrained on constitutional grounds by injunction.

Were only these considerations claiming judgment in construing inert language it would plainly follow, as the Court has concluded, that three judges are required to hear the complaint in this case, for constitutional claims are made and it is not precluded that injunctive relief may be granted on an obvious conflict with specific constitutional provisions. But so to rule here is in my view to fail to give due regard to countervailing considerations of far-reaching consequences to the federal judicial system, affecting the functioning of district and circuit judges as well as of this Court. Specifically, the convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves, or, in the case of federal regulatory legislation, through the administrative tribunal and a Court of Appeals. Also, where issues of local law have to be adjudicated before reaching questions under the United States Constitution, the desirability of having the appropriate Court of Appeals adjudicate such local issues becomes operative.

I deem regard for these demands which the three-judge requirement makes upon the federal judiciary to be the jurisdictional consideration of principal importance in a case such as this where a claim is seriously urged which necessarily involves, certainly in the first instance, construction of local or federal statutes, thus making potentially available a non-constitutional ground on which the case may be disposed of. It is more important that the ordinary operation of our judicial system not be needlessly disrupted by such a case than it is to insure that every case which may turn out to be constitutional is heard by three judges. I am led therefore to construe strictly the statutes providing the three-judge procedure relevant to this case so as to permit their invocation only when the claim is solely constitutional, thus tending to insure that the three-judge procedure will not be extended to non-constitutional cases not within its proper sphere.

My adherence to such confining construction of the necessity both for convening three judges and for this Court to be the first appellate tribunal is consistent with the approach this Court has taken when it has in the past refused to apply this legislation. See *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Ex parte Collins*, 277 U. S. 565; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386; *Ex parte Williams*, 277 U. S. 267; *Ex parte Public National Bank*, 278 U. S. 101; *Rorick* v. *Board of Commissioners*, 307 U. S. 208; *Ex parte Bransford*, 310 U. S. 354; *Wilentz* v. *Socony-Vacuum Oil Co.*, 306 U. S. 573; *Phillips* v. *United States*, 312 U. S. 246; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. As we stressed in *Phillips* v. *United States*, *supra*, these cases approach this three-judge statute as a procedural technicality and not as the embodiment of a more or less broadly phrased social policy the enforcement of which requires a generous regard for some underlying social purpose. In *Stainback* v. *Mo Hock Ke Lok Po*, *supra*, we

continued to refer to "the long-established rule of strict construction" of this provision for three judges, 336 U. S., at 378, and refused to find it applicable to the Territory of Hawaii. These cases recognize what the Court today in my view does not—that in giving scope to the three-judge requirement due regard should be given to the consequences to the effective functioning of the federal judiciary as a totality, especially to the fact that an expansive construction of the three-judge requirement increases the scope of this Court's direct review and thereby is at cross purposes with the Act of February 13, 1925, 43 Stat. 936, the primary aim of which was to keep our appellate docket within narrow confines. *See Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 321.

As against the result to which I am led by these important considerations bearing on the proper functioning of the federal judicial system, which I do not understand the Court to dispute, I cannot be persuaded, as apparently the Court is, by arguments stemming from "the explicit language," the literal sense, of 28 U. S. C. § 2281. Jurisdictional provisions are not to be read in isolation with mutilating literalness, but as harmonizing parts of the comprehensive, reticulated judicial system. For an instance of this Court's express refusal to give the surface literal meaning to a jurisdictional provision on the ground that to do so would not be consistent with the "sense of the thing" and would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it," see *American Security & Trust Co. v. Commissioners*, 224 U. S. 491, 495. And see *Ex parte Collins*, 277 U. S. 565, 568, where "[d]espite the generality of the language" of this three-judge provision, it was held that a suit was not one to restrain the operation of a state statute when "the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved." Reliance upon literalism in construing a juris-

dictional statute constitutes slavish adherence to words as though they were symbols having single, absolute meanings, and reflects indifference to the significance of jurisdictional legislation as a vehicle for judicial administration.

Nor am I persuaded that I must decide contrary to what are to me the considerations of proper judicial administration by what seems chiefly to have persuaded the Court, namely, that § 2281 "plainly . . . indicate[s] a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality." (Pp. 3-4 of the Court's opinion.) I can find no such plain congressional intention with regard to the problem presented by the present case. When the three-judge statute was first passed by Congress in 1910 it applied only to applications for interlocutory injunctions. Jurisdiction remained in a single judge to hear an application for a final injunction against the operation of a state statute on grounds of unconstitutionality, and a single judge had the power to grant such an injunction. Thus it is impossible to attribute to Congress at that time an intention that *any* case involving an injunction of a state statute on constitutional grounds be heard and determined by three judges. The concern was only with improvident interlocutory relief. And in 1925, when the three-judge statute was extended to include applications for final as well as interlocutory relief, the only evident concern of Congress was, as the Court agrees, "to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction." *Stratton v. St. Louis Southwestern R. Co.*, 282 U. S. 10, 14. It is, of course, common knowledge that Congress' central concern in enacting the Jurisdictional Act of 1925 was to restrict the obligatory appellate jurisdiction of this Court. This

although the result of the 1910 and 1925 Acts is language which on its face appears to prohibit one judge from ever enjoining a state statute on constitutional grounds. I do not think it fair to say that there was ever a deliberate accompanying purpose in Congress to achieve such a sweeping inflexible result. In the absence of any manifestations of such a purpose, I do not see why we should attribute to Congress, as the Court does, an intention to achieve a result which to me is plainly out of harmony with the best operation of the federal judicial system.

And if we are to look to our prior decisions for guidance with regard to the proper approach to statutes conferring upon this Court direct appellate jurisdiction over decisions in constitutional cases, I find much more relevant than the decisions relied upon by the Court, which reached the Court's result without consideration of the jurisdictional problems now presented, our decisions in *Ex parte Buder*, 271 U. S. 461, and in *Lemke v. Farmers Grain Co.*, 258 U. S. 50 (*Lemke I*). *Buder* arose under the three-judge statute involved in the present case and *Lemke I* arose under § 238 of the old Judicial Code which, no less literally than the statute in the present case, gave this Court direct appellate jurisdiction in cases in which a state law was "claimed to be in contravention of the Constitution of the United States." In both of these cases the jurisdictional problem was expressly considered, and the jurisdictional legislation was read so as not to require this Court's direct appellate jurisdiction in cases where non-constitutional claims were made, even though

It is interesting to note that while the Judicial Code also contains a provision requiring three judges to hear cases seeking injunctions of federal statutes on constitutional grounds (28 U. S. C. § 2282), Congress has left no room for doubt that in litigation attacking federal statutes if in fact (where the United States or one of its agents is a party) a federal statute is declared unconstitutional the case is to be directly reviewed here. 28 U. S. C. § 1252 so provides.

constitutional factors were also implicated and decision might ultimately have turned on constitutional grounds.

Legislating is for Congress. Applying what Congress has enacted requires oftener than not construction. That is a judicial function. This is particularly true of judiciary legislation which is mainly concerned with the distribution of judicial power through deployment of the judicial force and the effective exercise of appellate review. It is also true to state that Congress seldom concerns itself with this Court's decisions construing judiciary legislation unless some dramatic result arouses its interest. We do not have to go further for an illustration of this generalization than to notice the indifference of Congress, in the sense that no legislative changes have been proposed one way or the other, with regard to the Act involved in this case, or the Criminal Appeals Act of 1907. Because these things are true I am convinced that it would in no wise show a disregard for any legislative purpose in the enactment of the three-judge device, or for any kind of legislative attitude toward the series of cases in which this Court has since then applied that legislation, if now upon full consideration we were to construe this legislation in light of the demands of the federal system as a totality to restrict it to what was plainly the central concern of Congress, to wit, to those cases where state legislation is challenged *simpliciter* as directly offensive to some specific provision of the Constitution and where the claim is not entangled with other claims, usually turning upon the construction of local or federal statutes, which necessarily must be passed upon before the constitutional question is reached. I therefore dissent from the decision of the Court that we have jurisdiction in this case.